89-607

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE J. SMITH, EXECUTRIX OF THE ESTATE
OF MICHAEL J. SMITH,

Petitioner,

V.

UNITED STATES OF AMERICA;
LAWRENCE B. MULLOY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM F. MAREADY
Counsel of Record

1001 WEST FOURTH STREET
WINSTON-SALEM, NORTH CAROLINA 27101
(919) 725-2351

W. T. COMERFORD, JR.
G. GRAY WILSON
R. RAND TUCKER

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

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QUESTIONS PRESENTED FOR REVIEW

1. Are claims against the United States by the estate and survivors of a serviceman killed while on leave from active duty and on assignment to the National Aeronautics and Space Administration (NASA), a civilian agency, and working as an astronaut aboard a United States space shuttle, barred as a result of Feres v. United States, 340 U.S. 135 (1950), and its progeny?

2. Are claims asserted against an employee of a civilian agency of the United States, the National Aeronautics and Space Administration (NASA), barred as a result of Feres v. United States, 340 U.S. 135 (1950), and its progeny or 28 U.S.C.A. § 2679 (West Supp. 1989)?

3. Should Feres v. United States, 340 U.S. 135 (1950), and its progeny be overruled?

4. Do survivors of a serviceman killed while an astronaut aboard a United States space shuttle have standing to seek equitable relief compelling the United States to debar the responsible manufacturer from further work for the federal government?

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This petition seeks review on writ of certiorari of the decision of the United States Court of Appeals for the Eleventh Circuit recorded at 877 F.2d 40 (11th Cir. 1989), No. 88-3177 (July 11, 1989), which affirmed the orders of the United States District Court for the Middle District of Florida reported at 712 F. Supp. 893 (M.D. Fla. 1988), No. 87-398-CIV-ORL-19 (Feb. 22, 1988), and order dated March 22, 1988. The decisions referred to are appended hereto.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment entered on July 11, 1989 by the United States Court of Appeals for the Eleventh Circuit. Jurisdiction is conferred on this Court by 28 U.S.C.A. § 1254(1) (West Supp. 1989).

STATUTES AND REGULATIONS

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48 C.F.R. § 1809.405-1 (1988)

STATEMENT OF THE CASE

Plaintiff instituted this action on May 6, 1987, for the wrongful death of Michael J. Smith, also seeking equitable relief compelling defendant United States of America ("United States") to debar Morton Thiokol, Inc. from further work in the space shuttle program and compelling the reopening of production of solid rocket boosters for competitive bidding (Appendix at 72-123). Defendants United States and Lawrence B. Mulloy ("Mulloy") moved to dismiss. The district court allowed the motions to dismiss (712 F. Supp. 893 and order dated March 22, 1988; Appendix at 12-73) and the United States Court of Appeals for the Eleventh Circuit affirmed (877 F.2d 40; Appendix at 1-11). Morton Thiokol, Inc. was a defendant when the action was filed but was subsequently dismissed voluntarily.

This action arises from the death of Michael J. Smith on January 28, 1986. Smith was a commander in the United States Navy when he was selected by the National Aeronautics and Space Administration ("NASA") in 1980 as an astronaut in the space shuttle program. From the time of his selection, he was relieved of his military duties and received no further orders from the Navy. His work was entirely under the direction and control of civilian employees of NASA, and he was under no military constraints and did not participate in military activities. He had no commanding officer, made no reports to a military officer or facility, and used no Navy property or equipment in his work. (Affidavit of Jane J. Smith, Ex. 1 to plaintiff's memorandum to the district court, Appendix at 124-28.) While on a space

shuttle flight, Commander Smith was subject to the absolute authority of the shuttle commander (14 C.F.R. § 1214.702 (1989)), who, on the January 29, 1986 flight of the space shuttle Challenger, was a civilian. (Appendix at 127.)

On January 28, 1986, at approximately 11:38 a.m., the space shuttle Challenger was launched from Cape Canaveral, Florida. The seals of the aft field joint of the right solid rocket booster failed on ignition, and Challenger exploded approximately seventy-four seconds after liftoff. Smith was piloting the shuttle and was killed. As set forth in petitioner's complaint (Appendix at 74-123), the explosion and Commander Smith's death were a proximate result of defendants' negligence.

Jurisdiction as to defendant United States arose in the district court under

28 U.S.C.A. § 1346(b) (West 1976) on plaintiff's wrongful death claim, and under 28 U.S.C.A. § 1331 (West Supp. 1989) on plaintiff's claim for injunctive relief. Jurisdiction as to defendant Mulloy arose under 28 U.S.C.A. § 1332 (West 1966 & Supp. 1989) in that there was diversity of citizenship between the parties and the amount in controversy, exclusive of costs, exceeded $10,000.

ARGUMENT

I. THIS COURT SHOULD REVIEW WHETHER PETITIONER'S CLAIMS AGAINST THE UNITED STATES ARE BARRED BY THE FERES DOCTRINE.

This case presents the question of whether claims by servicemen injured or killed while assigned to NASA (or other civilian agencies) are barred as a result of this Court's decision in Feres v. United States, 340 U.S. 135 (1950). The court of appeals erred by extending the Feres doctrine to cover servicemen not engaged in military duty but instead serving as astronauts subject to a civilian chain of command. The court's holding is contrary to the national interest and to this Court's decisions.

The United States government, with the Federal Tort Claims Act of 1947, 28 U.S.C.A. §§ 1346(b), 2671-2680 (West 1965, 1976 & Supp. 1989) (FTCA), consented generally to suit by its citizens against the government; as a

result of injury or loss of property, or personal injury or death; caused by the negligence of governmental employees, to the extent suit would be permitted by the law of the place where the negligence occurred. The FTCA contains certain exceptions to the waiver of immunity, including one for "[a]ny claim arising out of combatant activities of the military or naval forces, or the Coast Guard during time of war," 28 U.S.C.A. § 2680(j) (West 1965).

In addition, in Feres v. United States, 340 U.S. 135 (1950), this Court held that actions are not maintainable by military personnel for injuries incurred incident to military service.

A. Smith's Work at NASA.

Commander Smith's activities at NASA not only compel the conclusion that Feres is inapplicable to servicemen assigned to that civilian agency but

also demonstrate the peculiar consequences that can result from applying the Feres exception too expansively.

While on leave from the military on assignment to NASA, Smith's work was the same as that of other civilian employees at that agency. The Code of Federal Regulations, reprinted in the attached appendix at 149-53, sets out the chain of command on space shuttle flights and provides that the shuttle commander has "absolute authority" over the others on board the shuttle. 14 C.F.R. §§ 1214.702-704 (1989). In the case of the Challenger the commander was Richard Scobee, a civilian. (Appendix at 127). The shuttle pilot, who in this case was Commander Smith, is also designated a "career NASA astronaut." Neither commander nor pilot is required to be a soldier, and in defining their roles, it

apparently was not contemplated that either would come from the military. In any event, whether civilian or military, commander and pilot are in a civilian chain of command unrelated to the military.

This is borne out by the Memorandum of Understanding ("MOU") between NASA and the military that was attached to defendant United States' memorandum to the distict court and appended to the district court's opinion. (717 F. Supp. 893, 903-05; Appendix at 58-70.)

The MOU provides that "[a] military member detailed to NASA shall not be subject to direction by or control by his Service or any officer thereof directly or indirectly, with respect to NASA responsibilities exercised in the position to which detailed." MOU § IV(c) (emphasis added). The MOU also provides that such military members are

subject to military policies and directives only to the extent that they "do not affect responsibilities exercised in NASA." MOU § IV(e). The MOU, then, provides that when a service member is engaged in work for NASA, he is not subject to military discipline and is no longer answerable to service members superior in rank. At the time of his death, Commander Smith was clearly performing duties assigned by NASA and its civilian employees, and he was in no way subject to direction or control by the Navy. While Smith was engaged with NASA, the Navy was not even entitled to recall him without NASA's approval. MOU § III(c).

NASA is not a fifth branch of the United States military. It is a civilian agency of the federal government, created by a congressional mandate that "aeronautical and space

activities . . . shall be the responsibility of, and shall be directed by, a civilian agency exercising control over aeronautical and space activities sponsored by the United States." 42 U.S.C.A. § 2451(b) (West 1973) (emphasis added). NASA is headed by an administrator who by law must be "appointed from civilian life," as must the deputy administrator, 42 U.S.C.A. § 2472 (West 1973). This requirement demonstrates that since its inception, NASA was not to serve as a part of the military but was to be distinctly civilian. The administrator, under the supervision and direction of the President of the United States, has authority over all NASA activities. Id. It was Congress' intent that outer space not be the province of the military services and that its exploration not be included in the military's

responsibilities. To suggest that someone assigned to NASA is pulling military duty is similar to saying the President of the United States is on active duty because he is also commander-in-chief. NASA was intentionally segregated from the military, and an astronaut's death can hardly be characterized as incident to military service.

B. Application of the Feres Doctrine.

The Feres decision set forth three stated rationales. First, it was asserted that because private citizens did not raise armies, there was no possibility of parallel private liability, such that the wording of the Act did not effect a waiver of immunity to claims by servicemen. This rationale was subsequently abandoned by the Court in Rayonier Inc. v. United States, 352 U.S. 315, 319 (1957); Indian Towing Co.

v. United States, 350 U.S. 61, 66-69 (1955); see also United States v. Johnson, 481 U.S. 681 (1987) (not listing absence of private liability as basis for Feres).

The decision also contained two rationales that were subsequently described as "no longer controlling," United States v. Shearer, 473 U.S. 52, 58 n.4 (1985), but which have recently been restated in United States v. Johnson, 481 U.S. 681 (1987): (1) the distinctively federal relationship between servicemen and the United States government militates against permitting the site of a serviceman's injury to affect his potential recovery against the government, and (2) a no-fault compensation system is available for injured servicemen. Four years later, the court in United States v. Brown, 348 U.S. 110 (1954), set forth the rationale

that, "[i]n the last analysis, Feres seems best explained by," United States v. Shearer, 473 U.S. at 57,

> [t]he peculiar and special relationship of the soldier to his superiors, the effect of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.

United States v. Brown, 348 U.S. at 112.

None of the rationales underlying Feres support its extension to those engaged in work at NASA. If an exception to the government's waiver of sovereign immunity is to be created for the nation's space effort, the creation of that exception should be left to Congress. A judicial creation of such an exception would require a rationale other than those underlying Feres and is a matter of legislative concern in which courts should be reluctant to intervene.

Unquestionably the most important factor underlying Feres is "whether the suit requires the civilian court to second-guess military decisions, and whether the suit might impair essential military discipline." United States v. Shearer, 473 U.S. at 57. The district court, whose opinion the court of appeals adopted wholesale, correctly concluded that the case at bar does not implicate this interest. At the time he was killed, Commander Smith "was not directly subject to military control; he was not under the compulsion of military orders; he was not performing any military mission." Parker v. United States, 611 F.2d 1007, 1014 (5th Cir. 1980) (holding death of plaintiff's decedent was not incident to military service). The district court observed:

> It does not appear from this record that the alleged acts of negligence in this case would raise "the prospect of compelled depositions

> and trial testimony by military officers concerning the details of their military command," [United States v.] Stanley, [483 U.S. 669, 682-83 (1987)]; that it would require military officers to testify as to each other's decisions and actions, see [United States v.] Shearer, 473 U.S. at 58; that plaintiff's claims would involve "second-guessing" military decisions, id. at 57; that the claims would implicate the "management" of the military, Shearer, 473 U.S. at 58; or that the claims would call into question "basic choices about the discipline, supervision, and control of a serviceman." Id.

712 F. Supp. 893, 899; Appendix at 36-37.

In fact, Smith had not performed military duties for five and a half years prior to his death. He was responsible to civilian governmental employees and did not answer to military superiors, and although a member of the U.S. Navy, he worked in a non-military role. Obviously this suit would not require testimony by his military superiors, since Smith had no commanding

officer at the time of his death and was not directly responsible to any military personnel. Nor would this case require the second-guessing of military decisions, since none are involved. One cannot conceive of an instance in which an action arising from a serviceman's death would have any less effect on military discipline, given that Commander Smith's only connection to the military at the time of his death was that he was a member of one of its branches.

> This is not a case that would
>
> require the civilian court to second-guess military decisions . . . [and] might impair essential military discipline. . . . To permit this type of suit would [not] mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions . . . .

United States v. Shearer, 473 U.S. at 57.

The courts below concluded that suit under these circumstances is not a threat to military discipline. Thus, the primary rationale for the Feres doctrine does not support its extension to NASA astronauts.

The two remaining rationales cited by this Court in United States v. Johnson, 481 U.S. 681 (1987), do not apply to this case. First, this Court observed that because servicemen are stationed in many different parts of the country, their recovery of compensation from the government should not turn on the site of the government's negligence. Unlike military servicemen, however, astronauts are not likely to be engaged in activity throughout the country, where the laws of dozens of jurisdictions might be applicable. Furthermore, where a serviceman is responsible to civilians rather than to

military superiors, as the NASA astronauts are, the "distinctively federal" character of a serviceman's relationship to the government is not distinguishable from a civilian employee's relationship to the government. Thus, this rationale does not support extension of the Feres doctrine to servicemen assigned to NASA.

The Court also indicated that the availability of compensation under the Veterans' Benefits Act, 38 U.S.C.A. § 101 et seq. (West 1979 & Supp. 1989) (VBA), supports the Feres doctrine. The availability of VBA benefits cannot determine when Feres applies since they are generally available irrespective of whether a serviceman's injury or death was incident to military service. 38 U.S.C.A. § 105 (West Supp. 1989); see United States v. Brown, 348 U.S. 110 (1954) (permitting claims where

plaintiff received VBA benefits). (These two factors are discussed further in section III, infra at 37.)

This is not an isolated case of whether a serviceman was on or off base, on military time or on his own time. Rather, the question presented by this case is one of national importance--whether servicemen assigned to NASA are without remedy in the courts if they are injured or killed by the government. The question presented is one with far-reaching consequences, and petitioner respectfully urges this Court to accept it for review.

II. THIS COURT SHOULD REVIEW WHETHER FERES BARS CLAIMS AGAINST CIVILIAN EMPLOYEES OF THE GOVERNMENT.

This case also presents the question of whether the Feres doctrine bars claims against individuals employed by the government, in this case defendant Mulloy, a NASA employee. The

decision of the court of appeals that such an action is barred is in conflict with decisions of other circuits and of this Court, and this Court should resolve that conflict.

Prior to the FTCA, the principle of sovereign immunity was not viewed as providing protection for individual governmental employees. One of the factors motivating passage of the FTCA was the plethora of lawsuits against governmental employees, which the Department of Justice felt compelled to defend for the sake of employee moral. United States v. Gilman, 347 U.S. 507, 512 (1954) (quoting Hearings before the House Committee on the Judiciary, HR 5373 and HR 6463, 77th Cong., 2d Sess. 9-10 (testimony of Assistant Attorney General Francis N. Shea)). Consequently, when the FTCA was enacted into law and provided a general waiver

of sovereign immunity of the United States for torts of its employees, the Act provided that any settlement with or judgment against the United States barred an action based on the same subject matter against the governmental employee whose conduct gave rise to the claim. 28 U.S.C.A. §§ 2672, 2676 (West 1965 & Supp. 1989).

Since it was thought that plaintiffs would be attracted primarily to the government's deep pocket, the FTCA did not proscribe private actions against governmental employees in their individual capacities for acts committed in the scope of their employment, and such suits were not unheard of; e.g., Moon v. Price, 213 F.2d 794 (5th Cir. 1954) (holding that where plaintiff recovered judgments against both United States and employee, satisfaction of either judgment would constitute

complete satisfaction of the other, and refusal after trial to set aside verdict and judgment against employee was not error). This Court, in holding that the FTCA does not permit the government to recover indemnity from one of its employees, observed:

> We do not deal with the liability of the United States, but with the liability of its employees. The Tort Claims Act does not touch the liability of the employees except in one respect: by 28 USC § 2676 it makes judgment against the United States "a complete bar" to any action by the claimant against the employee. And see § 2672 [making acceptance of administrative adjustments of claim complete release of any claim against United States or employee over same subject matter].

United States v. Gilman, 347 U.S. 507, 509 (1954) (emphasis added).

To hold that claims against individuals are barred by Feres requires one of two approaches. First, one may conclude that the FTCA reflects Congress' intent not only to provide an

unwritten exception to the waiver of sovereign immunity provided by the Act (an exception for claims against the government by servicemen injured incident to military service), but also that Congress intended with its waiver of sovereign immunity to impose immunity on individuals where no such immunity previously existed. This approach defies credulity and is in conflict with the decisions discussed above. The alternative approach is for the courts, rather than provide an interpretation of the FTCA, simply to make an ad hoc policy determination that common law causes of action previously existing are unwise. This approach, of course, is improper on its face. Nevertheless, at least one other circuit court has held that suits against individuals are barred by Feres, see Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981),

cert. denied, 456 U.S. 972 (1982), but that decision is in conflict with those discussed above.

This Court, moreover, has indicated that this approach is in error. In Chappell v. Wallace, 462 U.S. 296 (1983), this Court considered whether military personnel were permitted to bring actions, pursuant to Bivens v. Six Unknown Federal Narcotic Agents, 403 U.S. 388 (1971), against their military superiors for injuries arising from constitutional violations occurring in the course of military service. The Court concluded that:

> taken together, the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute "special factors" which dictate that it would be inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers.

462 U.S. at 304.

The extensive discussion in Chappell of Bivens actions would be superfluous if the Feres immunity applied to all causes of action brought by military personnel against governmental employees. More significant, though, is the Chappell Court's consideration of Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849), after remand, 53 U.S. (12 How.) 390 (1851), in which the Court permitted an action of trespass vi et armis, for assault and battery and false imprisonment, brought by a marine against his commanding officer for disciplinary actions taken against the marine. The Chappell Court found the Wilkes case "inapposite because it involved a well-recognized common-law cause of action by a marine against his commanding officer for damages suffered as a result of punishment and did not

ask the Court to imply a new kind of action." Chappell, 462 U.S. at 305 n.2 (emphasis added). The Chappell Court, then, distinguished Bivens actions and common-law actions and made clear that the Feres immunity does not apply to common-law causes of action, such as the one at bar.

Furthermore, the rationales underlying Feres do not justify its extension to provide immunity for civilians employed at civilian agencies to which the serviceman in question was also assigned. An individual defendant has no cognizable interest in having his liability insulated from differences in the laws of different jurisdictions. VBA benefits are paid by the government without reference to the liability of government employees. Had Congress intended that the payment of VBA benefits by the government absolve

individuals of liability, it could have said so. As the courts below concluded, the interests of military discipline are not implicated here, where a serviceman was assigned to a civilian agency and was killed as a result of negligence of civilians at that agency.

Finally, the court of appeals noted that 28 U.S.C.A. § 2679(b) (West Supp. 1989) was recently amended, with retroactive application, to provide that the remedy afforded by the FTCA is exclusive of an action against the negligent governmental employee. Where the FTCA affords a remedy, it is not surprising that Congress would want to prevent a double recovery and would prefer that any recovery be had from the government. Where the FTCA does not provide a remedy, however, because of Feres, the statute cannot be fairly construed to forbid any recovery

whatever. Otherwise, one must conclude that Congress intended to address pending valid claims by denying them altogether. If the FTCA is held to provide a remedy in this case, and if Mulloy was acting within the scope of his employment (a determination of which requires certification by the Attorney General or the trial court, neither of which has occurred), then no recovery would lie against Mulloy.

III. THIS COURT SHOULD REVIEW WHETHER FERES SHOULD BE OVERRULED.

The shortcomings of the Feres doctrine are eloquently described in Justice Scalia's dissent, joined in by three other justices, in United States v. Johnson, 481 U.S. 681, 692-703 (1987). As he observes, none of the rationales that underlie Feres justify its existence. More disconcerting is the inescapable fact that when Congress

enacted the FTCA and provided a waiver of sovereign immunity, it failed to create the exception embodied in this Court's decision in Feres. Indeed, the language of the Act indicates that Congress rejected the exception that this Court subsequently thought advisable.

Congress enacted the FTCA in 1946 and provided generally that the United States was subject to suit to the same extent as private persons. Among the exceptions set forth in the Act was one for "claim[s] arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war," 28 U.S.C. § 2680(j) (1965) (emphasis added). Congress did not enact a general exception for servicemen injured or killed incident to military service. Given the obvious application to servicemen of some of the exceptions

contained in the FTCA, "[i]t would be absurd to believe that Congress did not have the servicemen in mind" in passing the Act, Brooks v. United States, 337 U.S. 49, 51 (1949), yet the Act does not contain the exception embodied by Feres. Nevertheless, four years after passage of the FTCA, this Court, in Feres, created an exception to the waiver of sovereign immunity for claims by servicemen (or their estates) injured or killed incident to military service. Forty years later, the knowledge acquired from the passage of time and the twisted course that the Feres doctrine has followed indicates that the doctrine should be overruled.

As discussed in section I, supra, the rationales enunciated in Feres have either been abandoned or disapproved. As stated previously, although the "distinctively federal" relationship

rationale was thought to be implicated most when servicemen are injured incident to military service, it is difficult to see how the relationship is implicated to any lesser degree any other time a serviceman sues his government. If a line is to be drawn in this area, Congress did so with injuries suffered in wartime combat. In any event, arriving at Feres out of concern that servicemen would otherwise be afforded varying recoveries depending on where they are injured is an instance of burning the house to heat the kettle, given that "nonuniform recovery cannot possibly be worse than (what Feres provides) uniform nonrecovery." United States v. Johnson, 481 U.S. at 695-96 (Scalia, J., dissenting). The federal government's putative interest in uniform liability is undermined by the FTCA itself, which is designed to create

liability in the government based on local tort law. Furthermore, such interest fails to provide a basis for distinguishing servicemen injured incident to military service from other servicemen, or for that matter civilians, to whom the government may be liable.

The Feres rationale based on the availability of benefits under the VBA is, as stated previously, problematic in view of the absence of an exclusivity provision in the VBA and Congress' apparent contemplation that servicemen injured outside of wartime combat might recover under the FTCA. In any event, the availability of VBA benefits cannot be the basis of distinguishing servicemen injured incident to military service from those injured otherwise, since VBA benefits are generally available without regard to whether the

serviceman's injuries were suffered incident to military service. 38 U.S.C.A. § 105. (West Supp. 1989). Thus, the availability of VBA benefits does not preclude recovery under the FTCA; rather, the VBA offers the sole remedy to those whose claims are excepted from the government's waiver of immunity in the Act, such as servicemen injured in wartime combat. See United States v. Brown, 348 U.S. 110 (1954) (receipt of VBA benefits does not preclude recovery under FTCA). The VBA does not explain or justify Feres; rather, it only tempers the harsh effect of precluding recovery under the FTCA for servicemen injured or killed incident to military service. United States v. Johnson, 481 U.S. at 698 (Scalia, J., dissenting) (quoting Hunt v. United States, 636 F.2d 580, 598 (D.C. Cir 1980)). Recourse to the VBA,

standing alone, offers no support for the Feres doctrine.

Another rationale, not discussed by the Feres Court, was adopted by this Court four years later in United States v. Brown, 348 U.S. 110 (1954). According to this decision, the Feres doctrine is required to preclude civilian courts from second-guessing military decisions and impairing essential military discipline. United States v. Shearer, 473 U.S. at 57-58. This rationale, however, is also unpersuasive. Because military decisions may be subject to scrutiny in suits by civilians, and by servicemen injured while not engaged in military service, this rationale fails to provide a basis for distinguishing between servicemen injured incident to military service and those injured in other ways. Thus, if this rationale is to pass

muster, it must be based not on a reluctance to second-guess military decisions but instead on the supposedly positive effect Feres has on military discipline. Yet it is unclear how barring a serviceman from full recovery for his injuries enhances military discipline. Such concern was plainly absent when Congress enacted the FTCA, wherein it carved out other exceptions to the government's liability. See Bennett, The Feres Doctrine, Discipline and the Weapons of War, 29 St. Louis U.L.J. 383, 407-11 (1985). The interest in military discipline is certainly not so demonstrable that a court should conclude not merely that Congress should have legislated in accordance with the Feres doctrine but that in fact it intended to so legislate. Congressional enactments regarding military discipline have not revealed that intent:

> Since throughout our military history a policy of encouraging complaints of wrongs by military superiors has been codified in those statutes enacted by Congress pursuant to its constitutional authority to "make Rules for the Government and Regulation of the land and naval forces," it requires a considerable judicial impudence to announce that permitting complaints in a court of law would be injurious to the discipline of the armed forces. Our armed services have served the republic reasonably well under a policy which encourages complaints and requires redress of wrongs.

Jaffee v. United States, 663 F.2d 1226, 1260 (3d Cir. 1981) (Gibbons, J., dissenting, quoting U.S. Const. art. I, § 8, cl. 14), cert. denied, 456 U.S. 972 (1982).

Although it has been suggested that Congress may effectively overrule Feres by legislation, see United States v. Johnson, 481 U.S. at 690, congressional inaction is an uncertain barometer of legislative intent. This is particularly true where, as here, the courts, rather than interpreting a

statute, have in effect amended it. It places an unwarranted burden on the inertial legislative process to require Congress to pass a law providing that previously enacted legislation really does reflect its intent. As this Court recently observed:

> It does not follow [in statutory cases] that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is "impossible to assert with any degree of assurance that congressional failure to act represents" affirmative congressional approval of the Court's statutory interpretation. Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. See U.S. Const Art I, §7, cl 2. Congressional inaction cannot amend a duly enacted statute.

Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2371 n.1 (1989) (quoting Johnson v. Transportation Agency, 480U.S. 616, 671-72 (1987) (Scalia, J., dissenting)).

Plaintiff in United States v. Johnson, 481 U.S. 681 (1987), did not ask this Court to overrule Feres. Petitioner in the case at bar does. That courts still struggle with a misguided and confusing body of case law, nearly forty years after Feres was handed down, to define not only the scope of the Feres doctrine but also its rationale, demonstrates that this is not an instance in which notions of stare decisis should deter this Court from action. After all the words that have been written about Feres, after the "widespread, almost universal criticism" it has received, In re "Agent Orange" Product Liability Litig., 580 F. Supp. 1242, 1246 (E.D.N.Y.), appeal dismissed, 745 F.2d 161 (2d Cir. 1984), quoted in United States v. Johnson, 481 U.S. at 700-01 (Scalia, J., dissenting), the doctrine remains a principle in search

of a justification. It is time that this Court reconsider and overrule Feres and its progeny.

IV. THIS COURT SHOULD REVIEW WHETHER PLAINTIFF HAS STANDING TO SEEK EQUITABLE RELIEF.

The final question presented by this case is whether private citizens who are adversely affected by a contractor's continued performance of a government contract have standing to seek an order compelling the government to debar the contractor from further work for the government.[1] The district court

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[1]In her sixth claim for relief, plaintiff sought equitable relief compelling the government to debar Thiokol from further work under the shuttle program, enjoining further performance under the existing solid rocket booster (SRB) contract, and compelling the reopening of SRB production for competitive bidding (Appendix at 117-20.) (As alleged in para. XL of the complaint, plaintiff brought suit on behalf of herself and

(Footnote Continued)

addressed the claim for injunctive

(Footnote Continued)
her three children as well as the estate, as provided for in Fla. Stat. § 768.20.)

The statutes and regulations governing NASA's acquisition of property and services, 10 U.S.C.A. §§ 2301 et seq. (West Supp. 1989), require that a contract award based on competitive proposals be given to a "responsible source." 10 U.S.C.A. § 2305(b) (West Supp. 1989); 48 C.F.R. § 9.103(a) (1988) ("Purchases shall be made from, and contracts shall be awarded to responsible contractors only."). A finding that the contractor is responsible requires, among other things, that the contractor have "a satisfactory performance record" and "a satisfactory record of integrity and business ethics." 41 U.S.C.A. § 403(7) (West Supp. 1989) (definition adopted in 10 U.S.C.A. § 2302(3) (West Supp. 1989)); 48 C.F.R. § 9.104-1(c),(d) (1988); see also id. § 9.104-3(c) (prospective contractor that is or recently has been seriously deficient in contract performance is rebuttably presumed nonresponsible).

The regulations governing debarment of a contractor were adopted as an appropriate means to effectuate the underlying policy of these provisions. 48 C.F.R. § 9.402(a) (1988). The grounds for debarment include "a history of unsatisfactory performance" and "any other cause of so serious or compelling

(Footnote Continued)

relief with one paragraph, in which the

(Footnote Continued)
a nature that it affects the present responsibility of a government contractor." Id. at § 9.406-2(b),(c). A contractor debarred on these or other grounds is precluded from receiving contracts, or renewals or extensions of current contracts, during the period of debarment absent a finding of a compelling reason for such action, and current contracts may be terminated in appropriate circumstances. Id. §§ 9.405-1, 1809.4. The regulations recognize that debarment is to be imposed "in the public interest for the Government's protection." Id. § 9.402(a) (emphasis added).

The complaint alleges sufficient misconduct by Thiokol in its performance under the SRB contract to mandate its debarment and preclude it from eligibility for subsequent awards. NASA has refused to take action against Thiokol and its refusal is contrary to law, without rational basis and an abuse of discretion. NASA's failure to act is subject to review, and jurisdiction is properly based on 28 U.S.C.A. § 1331 (West Supp. 1989). Section 702 of the Administrative Procedure Act provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C.A. § 702 (West 1977). "Agency action" is defined to include an

(Footnote Continued)

court summarily concluded that plaintiff lacked standing to assert the claim, citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). (712 F. Supp. at 900, Appendix at 38.) The court of appeals adopted the district court's opinion without specific reference to the issue of standing. The courts below plainly erred in their determination of a matter of significant public interest, and their decision is contrary to prior decisions of this Court.

(Footnote Continued)
agency's failure to act. Id. §§ 551(13), 701(b)(2). Jurisdiction plainly lies under 28 U.S.C.A. § 1331 (West Supp. 1989) since the claim raises a federal question--whether NASA's continuing contractual relationship with Thiokol violates federal procurement statutes and regulations that prohibit the award of contracts to, and provide for debarment of, irresponsible contractors.

To establish standing, plaintiff need only meet the requirements imposed by Article III of the Constitution and claim an interest that is "arguably within the zone of interests to be protected or regulated by the statute . . . in question." Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970). Whether plaintiff will ultimately prevail on the claim is not relevant, since standing doctrine focuses on the party asserting a claim and not on the merits of that claim. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 484 (1982).

To satisfy constitutional standing requirements, plaintiff must establish an "actual or threatened injury" that "fairly can be traced to the challenged action" and "is likely to be redressed

by a favorable decision." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. at 472. Those requirements are met here. The continuing mental and emotional suffering of the plaintiff and her children satisfies the requirement of actual injury. This Court has repeatedly recognized that standing may be predicated on non-economic injury. Valley Forge Christian College, 454 U.S. 464; United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686-688 (1973); Association of Data Processing Serv. Orgs., Inc., 397 U.S. at 153-154. The injury claimed is not simply "a psychological consequence . . . produced by observation of conduct with which one disagrees." Valley Forge Christian College, 454 U.S. at 485. NASA's

relationship with Thiokol led to the death of Mrs. Smith's husband and her children's father. She has a sufficiently personal stake in the controversy, distinct from that possessed by the general public, to insure effective presentation of the claim.

The other constitutionally-required elements of standing are also present. The requirement that the injury be "fairly traceable" to the challenged action is not a strict one. United States v. SCRAP, 412 U.S. 669 (1973); (plaintiff's enjoyment of natural resources might be affected by an increase in rail rates for freight, given the prospect that increased rates would decrease the use of recyclable commodities and create more trash); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978)

(plaintiffs living near nuclear power plants under construction had standing to seek a declaratory judgment as to the validity of the Price-Anderson Act limiting the liability of utilities in the event of a nuclear incident because if the statute were found invalid, the utilities might decide not to complete construction of the plants, and the environmental and aesthetic consequences that would arise from actual operation of the plants would be avoided). The connection between the mental and emotional harm plaintiff alleges in this case and NASA's refusal to debar Thiokol is sufficient to establish standing. An injunction precluding further performance under the SRB contract and debarring Thiokol from additional contracts would redress the very injury plaintiff claims--the continuing harm and prospect of another shuttle tragedy

that would aggravate traumatic memories and exacerbate the ongoing emotional injury suffered by Mrs. Smith and her children. Mrs. Smith is obviously not an ordinary citizen seeking to challenge NASA's relationship with one of its contractors. As the widow of an astronaut killed aboard the space shuttle, she has a distinct interest in the safety of the shuttle program and the competence of the contractors who work on it. That interest is sufficient to bring her "arguably within the zone of interests" protected by the statutory and regulatory scheme in question.

This issue raises a disturbing question: if plaintiff in this case is without standing, who would have standing to seek debarment of a contractor that performed poorly while the government looked the other way? A family member whose husband or father

died as a result of that work has an interest in halting it so as to avoid further emotional injury. In the case at bar, the only people who conceivably might be deemed to have a greater personal interest are astronauts currently in the program, but they are government employees themselves with a strong disincentive to challenge government contracts. The public interest is ill served when no one else has standing to correct a supposed wrong, and this Court should consider reversing the lower courts on this basis.

Respectfully submitted,

William F. Maready
Counsel of Record

1001 West Fourth Street
Winston-Salem, North Carolina 27101
(919) 725-2351

W.T. Comerford, Jr.
G. Gray Wilson
R. Rand Tucker

APPENDIX

Statutes

Regulations

Jane J. SMITH, Executrix of the Estate of Michael J. Smith, Plaintiff-Appellant,

v.

UNITED STATES of America, Lawrence B. Mulloy, Defendants-Appellees.

No. 88-3177.

United States Court of Appeals, Eleventh Circuit.

July 11, 1989.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY, Chief Judge, COX, Circuit Judge and MORGAN, Senior Circuit Judge.

RONEY, Chief Judge:

Navy Commander Michael J. Smith was one of the crew members killed aboard the space shuttle Challenger when it exploded about 74 seconds after its launch on January 28, 1986. In this negligence action, Jane J. Smith, as

executrix of her husband's estate, sued the United States and Lawrence B. Mulloy, the Manager of the National Aeronautics and Space Administration's [NASA] Rocket Booster Program at Marshall Space Flight Center, for damages and injunctive relief. The plaintiffs initially sued, but have now settled with the manufacturer. The district court, relying on Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) and its progeny, granted the Government's motion to dismiss the claims against the Government and the individual defendant. For the purpose of the motion to dismiss, it was assumed the complaint accurately alleges that the accident was caused by the failure of the aft field joint on the right-hand solid rocket motor. We affirm.

[1] As for plaintiff's claims against the United States, we affirm on the basis of the well-reasoned opinion of the district court in Smith v. Morton Thiokol, No. 87-398-CIV-ORL-19 (M.D.Fla. Feb. 22, 1988), -- F. Supp. -- (N.D.Fla. 1988). Although plaintiff argued on appeal that the district court erred in failing to grant her discovery against the United States, since it is clear from the face of the complaint that this action is barred, there was no reversible error in prohibiting plaintiff from discovery against the United States.

[2] In a subsequent order, the district court granted the motion to dismiss for lack of jurisdiction the claim against defendant Lawrence B. Mulloy, a civilian employee of NASA, a Government agency. Without discussion, the court held that the Feres doctrine bars suit on a state law tort claim against civilian

government employees when injury to a person in military service occurs during activity incident to military duty, citing Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981), cert. denied, 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982), and Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730 (1980).

Even though Feres addressed the issue of sovereign immunity, courts, relying on the same policy reasons that bar suit against the Government for tort claims arising out of military service, have applied the Feres doctrine to immunize military defendants in their individual capacities. The Supreme Court has relied on Feres to bar claims of constitutional violations raised under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S.

388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) against individual defendants, both military,[1] and civilian.[2]

The Circuit courts have held that state law claims as well as federal law claims are so barred, both as to military employees,[3] and as to civilian

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1 Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983).

2 United States v. Stanley, 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987).

3 Mattos v. United States, 412 F.2d 793, 794 (9th Cir. 1969) (parents of deceased soldier barred from suing fellow servicemember); Bailey v. DeQuevedo, 375 F.2d 72, 74 (3d Cir. 1966) (medical malpractice suit against army physician brought under state law barred), cert. denied, 389 U.S. 923, 88 S.Ct. 247, 19 L.Ed.2d 274 (1966).

employees.[4] It is of no consequence that plaintiff seeks recovery not only on behalf of Smith's estate but on behalf of herself and the three minor

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[4] Jaffee v. United States, 663 F.2d 1226, 1234 -35 (3d Cir. 1981) (en banc) (suit barred against Government officials for intentional torts), cert. denied, 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982); Uptegrove v. United States, 600 F.2d 1248, 1250-51 Cir. 1979) (negligence action against civilian FAA Air Traffic Controllers prohibited)), cert. denied, 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730 (1980); Hass v. United States, 518 F.2d 1138, 1143 (4th Cir. 1975) (negligence suit against civilian stable employees of the Marines barred).

children.[5] We follow these cases which emphasize the activity in which the plaintiff was involved, an activity "incident to service," as the controlling factor, not the status of the tortfeasor. Thus, the district court properly held that there was a lack of subject matter jurisdiction over the claims against defendant Mulloy.

Subsequent to the district court's order in this case, Congress passed legislation that provides an additional reason for dismissing plaintiff's claims

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5 See Martinez v. Schrock, 537 F.2d 765 (3rd Cir. 1976) (army surgeon immune from suit brought by representative of deceased's estate under both a survival and wrongful death claim), cert. denied, 430 U.S. 920, 97 S.Ct. 1339, 51 L.Ed.2d 600 (1977).

against Mulloy. On November 18, 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub.L. No. 100-694, 102 Stat. 4563. The new law, which is retroactive, provides that the exclusive remedy for individuals allegedly harmed by common law torts committed by Government employees acting within the scope of their employment is through an action against the United States under the FTCA. This new legislation apparently would apply to this case, foreclosing plaintiff's suit against Mulloy in his individual capacity.

AFFIRMED.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give
Number Of Case And
And Names of Parties

July 11, 1989

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 88-3177 SMITH v. USA et al.

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to Rule 36 of the Federal Rules of Appellate Procedure. Fed.R.App.P. 39, 40 and 41, and the corresponding circuit rules govern costs, petitions for rehearing and mandate, respectively.

To be timely, a petition for rehearing or a suggestion of in banc consideration must be received in the clerk's office within twenty (20) days of the date of judgment. No additional

time for service by mail is permitted. See 11th Cir. R. 40-2.

Pursuant to Davidson v. City of Avon Park, 848 F.2d 172 (11th Cir., 1988), if attorney's fees on appeal are authorized by law they must be sought by filing a petition for attorney's fees with this office within fourteen (14) days of the date of the court's opinion. Any request for attorney's fees received after that date must be accompanied by a motion to file out of time.

In a direct criminal appeal, 11th Cir. R. 41-1 provides that issuance of the mandate shall not be stayed simply upon request: "Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay."

Counsel appointed under the Criminal Justice Act are reminded that 11th Cir. R. Addendum Four § (e)(4) provides: "In the event of affirmance or other action adverse to the party represented appointed counsel shall promptly advise the party in writing of the right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court. Counsel shall file such petition if requested to do so by the party in writing."

Sincerely,

MIGUEL J. CORTEZ, Clerk

By: Nancy Henderson
Deputy Clerk

Encl.

OPIN-1
3/89

cc: W. F. Maready, G. Gray Wilson
Gary W. Allen
John W. Adler, Michael McQuillen,
Catherine Tinker
Gary W. Takacs

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JANE J. SMITH, Executrix of the Estate of Michael J. Smith,

Plaintiff,

v.

MORTON THIOKOL, INC., et al.,

Defendants.

CASE NO. 87-398-CIV-ORL-19

ORDER

[FILED FEB. 22, 1988 at 11:11 A.M.]

This case comes before the Court upon the Motion to Dismiss of Defendant United States of America, and Memorandum in support thereof, filed June 19, 1987 (Doc. No. 17), and Memorandum in Opposition to Defendant United States of America's Motion to Dismiss, filed July 2, 1987 (Doc. No. 32); Federal Defendants' Motion to File Supplemental Memorandum in Support of Motions to

Dismiss, and Memorandum in support thereof, filed July 15, 1987 (Doc. No. 36); and Memorandum in Response to Supplemental Memorandum of Defendants United States of America and Lawrence B. Mulloy, filed July 23, 1987 (Doc. No. 40).

Federal Defendants' Motion to File Supplemental Memorandum in Support of Motions to Dismiss (Doc. No. 36) is hereby GRANTED. Accordingly, the Supplemental Memorandum in Support of the Federal Defendants' Motions to Dismiss and Plaintiff's Memorandum in response thereto have been considered by the Court in reaching its determination on the Defendant United States of America's Motion to Dismiss.

Plaintiff's late husband, Commander Michael J. Smith, was killed aboard the space shuttle Challenger when it exploded during flight on January 28,

1986. Plaintiff, Jane J. Smith, is the executrix of her late husband's estate. On May 6, 1986, Plaintiff filed a six-count Complaint in this Court seeking damages from Defendants, Morton Thiokol, Inc., the United States of America, and Lawrence B. Mulloy. Plaintiff's Complaint also seeks injunctive relief against Defendants Thiokol and United States.

In the Motion presently before this Court, Defendant United States seeks dismissal of Plaintiff's Complaint insofar as it asserts claims against the United States pursuant to the Federal Tort Claims Act [FTCA] on the ground that these claims are barred by the doctrine established in Feres v. United States, 340 U.S. 135 (1950). In Feres, the United States Supreme Court held that ". . . the Government is not liable under the Federal Tort Claims Act for

injuries to servicemen where the injuries arise out of or are in the course of activity incident to the service.[1] Id. at 146. Although the vitality of the Feres doctrine has been questioned in the past, its holding was reaffirmed last year by the Supreme Court in United States v. Johnson, 107 S.Ct. 2063, 2069 (1987), wherein the doctrine was applied to bar claims filed on behalf of a deceased serviceman who

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[1] The Feres doctrine is a judicially created exception to the waiver of sovereign immunity contained in the FTCA,, 28 U.S.C. § 2674 (the United States is liable in tort "in the same manner and to the same extent as a private individual under like circumstances").

was killed during activity incident to service.[2]

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[2] In Johnson, the widow of a Coast Guard helicopter pilot brought a wrongful death action against the United States pursuant to the FTCA, alleging that the negligence of an air traffic controller of the Federal Aviation Authority, a civilian agency of the federal government, had caused the crash in which her husband died. Relying on Feres, the district court dismissed the suit. The Eleventh Circuit Court of Appeals reversed, distinguishing Feres from cases in which negligence is alleged on the part of a government employee who it not a member of the military. Finding the effect of a suit on military discipline to be the Feres doctrine's primary justification, the Court ruled that the doctrine did not bar the suit because there was no indication that the conduct or decisions of military personnel would be subjected to scrutiny if the case proceeded to trial. The United States Supreme Court reversed, holding that the Feres doctrine bars an FTCA suit on behalf of a service person killed incident to service even if the alleged negligence was by civilian employees of the federal government.

Three rationales underlie the Feres doctrine. First, the distinctively federal character of the relationship between the Government and Armed Forces personnel necessitates a federal remedy that provides simple, certain, and uniform compensation, unaffected by the fortuity of the situs of the alleged negligence. Second, because those injured during the course of activity incident to service receive generous statutory veterans' disability and death benefits, it is unlikely that Congress intended to include them within the scope of FTCA coverage. Third, a suit based upon service-related activity involves the courts "in sensitive military affairs at the expense of military discipline and effectiveness." Johnson, 107 S.Ct. at 2063 (quoting United States v. Shearer, 473 U.S. 52, 59 (1985)). To determine whether a

claim is barred by Feres, this Court must consider all three rationales and apply each of them to the facts of this case. Del Rio v. United States, 833 F.2d 282, 286 (11th Cir. 1987). When a case falls within the bounds of Feres, the Court has no jurisdiction to hear the case. Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1157 (5th Cir. 1981); see Atkinson v. United States, 825 F.2d 202, 204 n.2 (9th Cir. 1987).

The critical issue with respect to the Government's Motion to Dismiss involves what Plaintiff refers to as the "touchstone" of the Feres doctrine: whether Commander Smith was, at the time of his death, "performing activities incident to his federal service." Johnson, 107 S.Ct. at 2068. Plaintiff contends that Commander Smith was killed during an activity that was not incident

to his service, and, therefore, Plaintiff's claims are not barred by the Feres doctrine.

In Parker v. United States, 611 F.2d 1007 (5th Cir. 1980), the Fifth Circuit Court of Appeals set forth a three-part test for determining whether the activity of a serviceman was "incident to service" for purposes of the Feres doctrine.[3] The factors to be considered include (1) the duty status of the service member; (2) the place where the injury occurred; and (3) the activity in which the serviceman was engaged at the time of the injury. The Eleventh Circuit Court of Appeals

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[3] The same three-part test has also been adopted by other Circuit Courts of Appeal. See, e.g., Brown v. United States, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985).

recently stated that the trial court must first evaluate the relative weight of these factors and then, based on the totality of the circumstances, determine whether the activity was incident to service. See Pierce v. United States, 813 F.2d 349 (11th Cir. 1987). This Court must bear in mind the Supreme Court's warning that "[t]he Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases." United States v. Shearer, 473 U.S. 52, 57 (1985).

The following facts are not in dispute. On April 13, 1959, President Eisenhower approved an agreement among the Departments of Defense, the Army, the Navy, the Air Force and the National Aeronautics and Space Administration [NASA] concerning the detailing of

military personnel to NASA.[4] See App. I. This agreement has remained essentially unchanged since its approval. In 1976, the Department of Defense and NASA executed a Memorandum of Understanding [MOU] among the Department of Defense, the Army, the Navy, the Air Force and NASA, which updated the 1959 agreement and provided for the detail of military personnel to NASA as space shuttle astronauts. See App. II. By its terms, the MOU is designed, in part, to "[p]rovide effective support for the national program of developing the Space Transportation System, using specific skills and knowledge possessed by military

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[4] The participation of military personnel in NASA space flight programs had its genesis in the National Aeronautics and Space Act of 1958, 42 U.S.C. § 2451, et seq.

members of the Army, Navy, AF and Marine Corps." Id. at § I(a).

Commander Smith, a commissioned officer of the United States Navy, was one of nineteen persons whose selection as Astronaut Candidates was announced on May 29, 1980. Thirteen of these Astronaut Candidates, including Commander Smith, were military personnel detailed to NASA by the armed services. In October of 1981, Commander Smith was certified as a member of the United States Astronaut Corps. He was subsequently designated to serve as the pilot of the Challenger on its ill-fated flight.

At the time the accident giving rise to this action occurred, Commander Smith was on active military duty. His detail to NASA did not affect his military status, rank and privileges. See App. I. and II at § IV(a). He remained

subject to the Uniform Code of Military Justice and to the policies and directives of the United States Navy with regard to discipline, leave, flying requirements, and other policies and directives which did not affect his NASA responsibilities. See App. I at § IV(a) and App. II at § IV(e). The promotion policies of the United States Navy also continued to apply to Commander Smith. See App. I at § IV(a) and App. II at § IV(g). As a result of his death, his dependents are receiving death benefits under the Veterans' Benefits Act.

Plaintiff asserts that the "incident to military service" test is not met in this case because, at the time of his death, Commander Smith was subject to the orders and direction of NASA, a civilian agency, and was not subject to military control; his activities had nothing to do with the military and he

had no military duties; and his death did not occur on a military reservation.

The Court will consider each of the three Parker factors seriatim.

Duty Status

Plaintiff maintains that the "duty status" factor is not met in this case because Commander Smith was "not on regular military assignment and in fact had no military duties whatever at the time of his death." Plaintiff's Memorandum in Opposition to Defendant United States of America's Motion to Dismiss, Doc. No. 32 at 5. This Court disagrees.

In Stanley v. Central Intelligence Agency, 639 F.2d 1146 (5th Cir. 1981), the plaintiff serviceman contended that his participation in a chemical warfare testing program should not be considered "activity incident to service" because he had been given a release from his regular duties in order to participate

in the program. The Fifth Circuit Court of Appeals found that plaintiff's argument to be without merit, citing with approval several cases wherein the courts had found a plaintiff had suffered injury while performing an activity incident to service even though the plaintiff had been released from his routine service duties or was off-duty. The Stanley Court concluded:

> In contrast [to the plaintiff in Parker v. United States], Stanley was not on a pass and was not tending to purely personal business at the time this alleged injury arose. At the time Stanley was given LSD, he was a Master Sergeant in the Army who had volunteered to participate in an experimental program in lieu of his regular duties. The experiment was conducted on an Army base by and for the benefit of the Army. Thus, the relationship between Stanley and the allegedly negligent individuals stemmed from their official military relationship. Stanley had been informed that he was free to leave the testing program at any time; however, this

> freedom appears to have been restricted to his returning to his original post at Fort Knox. He did return to his original duties there after he was released from Edgewood and remained in the service for eleven years. At least, therefore, he was subject to ultimate military control throughout the duration of his participation in the program. Stanley was receiving military pay and was promised a letter of commendation for his participation in the program. Clearly his participation in the program was activity incident to his military service despite the fact that he had been given a release from his regular duties.

639 F.2d at 1152 (citations omitted).[5]

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[5] Although the Court of Appeals found that the trial court correctly applied Feres and held the United States immune to all of Stanley's claims under the FTCA, the Court reversed the trial court's granting of summary judgment and remanded, finding that the trial court should have dismissed the case for lack of subject matter jurisdiction. 639 F.2d at 1148. Stanley filed an amended complaint. The district (Footnote continued)

(Footnote continued)
court dismissed Stanley's FTCA action, 549 F.Supp. 327, and also dismissed Stanley's Bivens action, 552 F.Supp. 619. Stanley then filed a second amended complaint. The district court denied Stanley's motion to amend his Bivens complaint and certified its order for interlocutory appeal. The Eleventh Circuit Court of Appeals affirmed and, in addition, ordered reinstatement of Stanley's FTCA action on the ground that controlling precedent interpreting the Feres doctrine did not automatically bar Stanley's FTCA claims. 786 F.2d 1490. On appeal, the United States Supreme Court held, in pertinent part, that the issue of whether Stanley's participation in drug testing was incident to his service had been decided adversely to Stanley and there was "no warrant for reexamining that ruling . . . ." United States v. Stanley, 107 S.Ct. 3054, 3061 (1987). On remand, the Court of Appeals acknowledged the Supreme Court's holding that it did not have jurisdiction of Stanley's FTCA claims when it entered its decision reinstating the FTCA claims, and, therefore, stated that the "order has no effect on the district court's dismissal of Stanley's FTCA claims." 828 F.2d 1498, 1499 (11th Cir. 1987). In any event, recent United States Supreme Court precedent calls into doubt the reasoning expressed by the Court of Appeals in its second decision in Stanley. See note 8, infra.

As noted above, Commander Smith was a career officer on active duty with the United States Navy at the time of the Challenger disaster. He had volunteered to participate in the NASA space shuttle program and competed against others for a position as an astronaut. While detailed to NASA, Commander Smith was not subject to direct military orders and was not required to perform his regular Navy duties; his NASA participation was in lieu of his regular duties. He was, however, subject to military policies and directives to the extent that they did not affect NASA responsibilities, and he retained his military rank and privileges. The Court finds that Commander Smith remained "subject to ultimate military control throughout the duration of the [space shuttle] program."

Place of Death or Injury

Neither the alleged negligence giving rise to the shuttle disaster nor Commander Smith's death occurred on a military reservation. The fact that a death or an injury, or the allegedly negligent act which resulted in the death or injury,[6] occurred on a military base is strong evidence that a plaintiff was engaged in activity incident to service. Stanley, 639 F.2d at 1151. The fact that a death or injury occurred

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6 This Court questions the relevance of the "military base" test to the situs of the death or injury in cases where the death or injury occurs in flight, especially when the allegedly negligent act which gave rise to the death or injury occurred elsewhere. See Bozeman v. United States, 780 F.2d 198 (2d Cir. 1985) (holding that, in applying the Feres doctrine, the district court properly looked at the location of the alleged conduct giving rise to the tort liability).

while the service person was off the military base, however, does not preclude application of the Feres doctrine to bar recovery under the FTCA. See, e.g., United States v. Shearer, 473 U.S. 52 (1985); Satterfield v. United States, 788 F.2d 395 (6th Cir. 1986); Stansberry v. Middendorf, 567 F.2d 617 (4th Cir. 1978).

Activity at the Time of Death or Injury

The last prong of this Circuit's three-part test for determining whether an activity was incident to service requires the Court to consider the activity in which the serviceman was engaged at the time of the occurrence giving rise to the action. As noted above, Plaintiff contends that her husband's position as pilot aboard the space shuttle Challenger was not an activity incident to his military service because Commander Smith was not

performing a military mission and was not under the compulsion of military orders. This Court rejects the argument that no proximate relationship existed between Plaintiff's employment as the Challenger pilot and his status as a serviceman and finds instead that the activity in which Plaintiff was engaged at the time of his death -- piloting the space shuttle Challenger -- arose by virtue of his status as a member of the armed services.

It is true that civilians are eligible to become space shuttle crew members[7] and that civilians were, in

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[7] See, e.g., App. II. at § II(b) ("It is understood that NASA is now desirous of initiating the process by selecting approximately 30 shuttle crew members, a substantial number of whom might be selected from the [military]") (emphasis added).

fact, among the crew members killed aboard the Challenger. For purposes of this inquiry, however, the salient fact is that Commander Smith was aboard the space shuttle as a result of his participation in a program whereby military personnel are detailed to NASA to perform appropriate services.

Application of the Feres Doctrine Rationales

The Court finds from the totality of the circumstances that Commander Smith's death occurred during activity incident to his military service. Accordingly, the Court must now consider whether the rationales underlying the Feres doctrine preclude Plaintiff's suit against the United States of America.

Because Commander Smith was killed while performing activities incident to his military service, the Court finds that the first rationale -- the federal

relationship -- is implicated here. See Johnson, 107 S.Ct. at 2068 (this rationale "is implicated to the greatest degree when a service member is performing activities incident to his service"). The second rationale underlying the Feres doctrine is also implicated in this case because, as a result of his death, Commander Smith's dependents are receiving and will continue to receive Veterans' benefits.

Whether the third, and possibly most compelling rationale,[8] is

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[8] In United States v. Shearer, 473 U.S. 52 (1985), the United States Supreme Court indicated that the military discipline rationale was determinative and that the other rationales underlying Feres were "no. longer controlling," id. at 58 n.4. In United States v. Johnson, 107 S.Ct. 2063 (1987), however, the Court cited with approval all three of the Feres rationales, thus "breath[ing] new life into the first two Feres rationales."

implicated in this case is a harder question. This rationale involves

> [t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . .

Stencel, 431 U.S. at 671-72 (quoting United States v. Brown, 348 U.S. 110 (1954)). The Supreme Court recently elaborated:

> Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service

> and thus have the potential to disrupt military discipline in the broadest sense of the word.

Johnson, 107 S.Ct. at 2069.[9]

Despite Johnson's teaching that the third Feres rationale encompasses "military discipline in the broadest sense of the word," this Court is not convinced that military discipline concerns are implicated under the peculiar facts of this case. The serviceman in Johnson was killed while "acting pursuant to standard operating procedures of the Coast Guard" during a Coast Guard mission. Id. Thus, "the potential that

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Atkinson v. United States, 825 F.2d 202, 205-06 (9th Cir. 1987). Whether the military discipline rationale should be afforded any greater weight than the other rationales is presently unclear.

[9] See note 2, supra.

[the] suit could implicate military discipline [was] substantial." Id. Commander Smith, on the other hand, was killed while on a mission for NASA, a civilian agency, during which time he was under the direct supervision of NASA, not military, personnel.

Defendant United States asserts that the "maintenance of this suit could lead directly into questions concerning the military's monitoring, participation and management -- or lack thereof -- of a civilian program from which the military derives direct benefits." The Court finds that no real likelihood of such inquiry exists. It does not appear from this record that the alleged acts of negligence in this case would raise "the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands," Stanley, 107 S.Ct. at 3063;

that it would require military officers to testify as to each other's decisions and actions, see Shearer, 473 U.S. at 58; that Plaintiff's claims would involve "second-guessing" military decisions, id. at 57; that the claims would implicate the "management" of the military, Shearer, 473 U.S. at 58; or that the claims would call into question "basic choices about the discipline, supervision, and control of a service-man." Id.

This Court has found, however, that the first two rationales underlying the doctrine militate in favor of the conclusion that Plaintiff's claims against Defendant United States of America are barred. In view of these circumstances, and in light of the United States Supreme Court's recent endorsement of the first two Feres rationales in United States v. Johnson, see note 8, supra,

this Court is compelled to find that it lacks subject matter jurisdiction over the Plaintiff's FTCA claims against Defendant United States of America.

In the remaining Count, Plaintiff seeks equitable relief permanently enjoining Defendants United States of America and Morton Thiokol, Inc., from further performance under the existing contract for supply of solid rocket boosters to NASA and debarment of Morton Thiokol from further work in the shuttle program. The Court finds that Plaintiff has failed to allege a sufficient basis for her standing to bring this action for injunctive relief. See Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982). Accordingly, this claim must be dismissed.

For the reasons expressed, the Plaintiff's claims brought pursuant to

the Federal Tort Claims Act (Counts One, Two, Three, Four and Five) are hereby DISMISSED as to Defendant United States of America pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, for lack of subject matter jurisdiction. Count Six is hereby DISMISSED as to Defendants United States of America and Morton Thiokol.

DONE AND ORDERED in Chambers at Orlando, Florida, this 22nd day of February, 1988.

S/
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
W. F. Maready, Esq.
Leon H. Handley, Esq.
Gary W. Allen, Esq.
Larry D. Gregg, Esq.
Kendell W. Wherry, Esq.
Thomas W. Burke, Esq.
John W. Adler, Esq.

COURT'S APPENDIX I

Agreement Between
the Departments of Defense, Army, Navy
and Air Force
and
The National Aeronautics and
Space Administration
Concerning the Detailing of Military
Personnel for Service with NASA

This agreement shall govern the detailing of members of the Army, the Navy, the Air Force and the Marine Corps for service with the National Aeronautics and Space Administration (NASA) as provided for in Section 203(b)(12) of the National Aeronautics and Space Act of 1958 (P.L. 85-568).

I. General

NASA, the Department of Defense, and the Military Departments, through their respective Members on the Civilian-Military Liaison

Committee (CMLC)[1] will arrange by mutual agreement for the detailing or military personnel to perform appropriate services for NASA in furtherance of the functions assigned to NASA by the National Aeronautics and Space Act of 1958. As requirements arise within NASA for services of military personnel, NASA and the Department of Defense through such CMLC Members will agree on the nature of duties to be performed by such personnel, the organizational positions in NASA to

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1 As used in this Agreement, the term "Members of the Civilian-Military Liaison Committee" means "offices designated by a Military Department for this purpose" or "a Military Department" itself. (This clarification is effective February 13, 1962.)

which each of the military personnel will be assigned, and the names of military personnel to be detailed to perform such duties. Such agreements will in each case be confirmed by letter.

II. Requests and Designations

(a) NASA will advise the CMLC Member concerned as soon as it foresees a requirement for the services of a member of the military services. Such request will be confirmed in writing, with copies to all CMLC Members, describing the qualifications and the duties to be performed by each person to be detailed to NASA and the date when NASA would like to

have the person available for duty.

(b) The CMLC Member concerned will furnish to NASA as promptly as possible, recommendations of individuals to be detailed, including names, ranks, and summaries of the qualifications of persons recommended.

*III. Acceptance and Detail

(a) NASA will advise the CMLC Member concerned as promptly as possible when a person recommended for detailing has been accepted. Personnel accepted by NASA will be detailed to duty with NASA by the Military

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* Amended, effective September 14, 1963, see Attachment B.

Department concerned as closely as possible to the date agreed upon between NASA and the CMLC Member involved.

(b) The Military Departments will assign members detailed to NASA to appropriate military units for the purposes of providing rations, quarters, medical treatment, and other administrative services and will inform NASA of such assignment. Those military units will provide NASA with appropriate information required for personnel administration, including the security clearances of the personnel detailed.

(c) (1) The normal tour of duty with NASA for military personnel on active duty will be three years. In the case of ROTC graduates the tour may be shorter. NASA will send a timely request to the Military Department concerned, through the Department's Member on the CMLC, for any desired extension. Each request for extension of a tour of duty with the NASA will be for no more than one year.

(2) Military personnel detailed to the Agency may be recalled prior to the end of the normal tour of duty upon the request of the Administrator, NASA.

(3) The Military Department concerned may recall any person detailed to NASA if the Secretary of the Department concerned determines that recall of the individual concerned is required, or if the active duty status of that person is to be terminated. The Military Department concerned will give NASA reasonable advance notice of plans to recall a detailed person.

IV. Status, Direction and Control

(a) Service in NASA under this Agreement will in no way adversely affect the status, rank, office, or grade which commissioned officers or enlisted men may occupy or hold

or any emolument, perquisite, right, privilege or benefit (including promotion in military rank) incident to, or arising out of any such status, rank, office, or grade. Personnel detailed to NASA will remain subject to the Uniform Code of Military Justice and to policies and directives of the Military Department concerned with regard to military discipline, leave, and flying requirements.

(b) Except as noted in (a) above, persons detailed or appointed to NASA will not be subject to direction or control by the Department from which detailed

with respect to their duties and responsibilities with NASA. Personnel detailed to NASA will be governed by all appropriate regulations and directives of NASA.

(c) The Military Departments will not assign duties to the personnel detailed to NASA in addition to their duties with NASA. However, it is agreed that detailed officer personnel may provide liaison between NASA and their respective Military Departments in technical areas of mutual interest. Also, under extraordinary circumstances a Military Department, through its CMLC Member, may request

NASA to assign military personnel on detail to some special duty.

(d) Effectiveness reports for military personnel detailed to NASA will be prepared in accordance with the regulations of the officer's service by NASA personnel responsible for supervision of the officer involved, in consultation with an officer designated for this task by the Military Department involved.

(e) NASA will advise the CMLC Member of the Military Department concerned when significant changes are made in the position or duties of a person detailed to NASA. Changes

will be made in duty stations only with concurrence of the Military Department concerned.

V. Pay and Reimbursement

(a) The Military Departments will pay to personnel whom they detail to NASA all pay and allowances as provided by the Career Compensation Act of 1949, as amended, except as may be otherwise provided in (c), (d), and (e) below.

(b) NASA will reimburse the Military Department for all payments made in accordance with the preceding paragraph. This obligation of NASA will begin and terminate on the dates of detachment for Navy personnel and on the effective dates of

change of station for Army and Air Force personnel. The Military Departments will send requests for reimbursement to the Agency on a quarterly basis.

(c) The Military Departments will bear costs incident to the initial detail of their personnel to NASA. NASA will bear the costs incident to the termination of details.

(d) NASA will pay all travel costs incident to the performance of duties for NASA by personnel detailed to NASA, including costs associated with changes in duty stations.

(e) Reimbursement of travel costs to detailed personnel will be

in accordance with Joint Travel Regulations.

VI. Special Agreements

Matters that are of peculiar concern to one of the Military Departments of detailing of personnel for projects of a special nature may require special agreements between the Military Department concerned and NASA. Any such special agreements shall be put in the form of Annexes to this Agreement signed by appropriate representatives of NASA and the Military Department concerned. If any special agreement is proposed under this provision, the Military Department concerned will keep the other Military Departments and the Secretary of Defense fully informed of the development of the proposed special agreement.

VII. Previous Agreements

This agreement supersedes all agreements regarding the detail of personnel between the Military Departments and the NACA. Personnel detailed to NASA under those agreements shall continue to serve under the terms of this agreement, as though initially detailed hereunder.

For the National Aeronautics and Space Administration:

Signed T. Keith Glennan
date: 24 February 1959

APPROVED: (S) Dwight Eisenhower

April 13, 1959
The President

For the Department of Defense:

Signed Donald A. Quarles
date: 3 Apr '59

For the Department of the Army:

Signed Wilber M. Brucker
date: 12 March 1959

ATTACHMENT A TO NMI 1052.11A

For the Department of the Navy:

Signed Thomas S. Gates
date: March 12, 1959

For the Department of the Air Force:

Signed James H. Douglas
date: March 24

Amendment No. 1 to Agreement
Between the Departments of Defense,
Army, Navy and Air Force
and
The National Aeronautics and
Space Administration
Concerning the Detailing of
Military Personnel
for Service with NASA

Acceptance and Detail

Section III of the Agreement shall be amended by adding the following sub-paragraphs:

(d) At intervals of approximately one year following detailing to NASA, each military assignee of the rank of Major/ Lieutenant Commander or above fulfilling a technical assignment will be ordered by the Military Department concerned to one week of temporary duty

with that Department, preferably at his Service Headquarters but alternatively at an appropriate field command or establishment designated by the parent Service, in order that he may become up-dated in the latest military requirements and weapon system developments within his Service, and may convey to his Service the latest technical information available within NASA and related to such requirements and developments.

(e) The agreed arrangements concerning pay and allowances will not be affected by this temporary duty. Basic travel

costs incident to these periods of temporary duty will be borne by NASA. The costs of any additional travel ordered by the Service concerned during the period of temporary duty will be borne by that Service.

For the National Aeronautics and Space Administration:

(S) James E. Webb
Date Jul 1 1963

For the Department of Defense:

Robert S. McNamara
Date 9/14

COURT APPENDIX II

MEMORANDUM OF UNDERSTANDING (MOU)
BETWEEN
THE DEPARTMENT OF DEFENSE, THE ARMY,
THE NAVY AND THE AIR FORCE
AND
THE NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION
CONCERNING THE DETAILING OF
MILITARY PERSONNEL
FOR SERVICE AS SHUTTLE CREW MEMBERS

This agreement shall govern participation by military personnel of the Army, Navy, Air Force and Marine Corps in carrying out the functions of the National Aeronautics and Space Administration (NASA) as shuttle crew members, as provided by Section 203(c)(12) of the National Aeronautics and Space Act of 1958. To the extent that the Agreement Between the Departments of Defense, Army, Navy, and Air Force and The National Aeronautics and Space Administration concerning the Detailing of

Military Personnel for Service with NASA, effective 13 April 1959,* pertains to the tour of duty of military personnel detailed to NASA as astronauts, that agreement is modified by this agreement.

I. GENERAL

This MOU is designed to:

(a) Provide effective support for the national program of developing the Space Transportation System, using specific skills and knowledge possessed by military members of the Army, Navy, AF and Marine Corps.

(b) Insure that NASA and the DOD, through their designated representatives, will agree on the duty stations and the nature of duty to be performed by each individual.

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* See NMI 1052.11A

II. REQUESTS AND DESIGNATIONS

(a) NASA will send requests to the DOD at least twelve months in advance to fill positions agreed upon under paragraph I above which are or will become vacant. Each Service will be notified of said request by DOD, and each Service will prepare a list of candidates to fill said positions on a "best qualified" basis, and submit the list to NASA JSC, Houston, Texas. NASA will select potential shuttle crew members from these lists. Each Service will be particularly aware of NASA's desire to encourage participation by women and minority groups as crew members and will ensure

that procedures are designed to maximize the opportunities for them to apply.

(b) It is understood that NASA is now desirous of initiating the process by selecting approximately 30 shuttle crew members, a substantial number of whom might be selected from the DOD. As outlined in (a) above, each Service will provide to NASA a list of qualified candidates no later than 1 July 1977, meeting criteria to be provided between the parties. Each candidate's name should be accompanied by an appropriate personnel folder, containing such information as required by NASA. For this selection cycle, both

shuttle pilots and shuttle mission specialists are required.

III. ACCEPTANCE AND DETAIL

(a) NASA will advise the Services concerned as soon as possible, listing those candidates selected.

(b) It is understood that the candidates selected in the cycle beginning 1 July 1977 are accepted by NASA only as potential shuttle crew members, subject to the successful completion of a training and indoctrination period lasting approximately two years. NASA will promptly inform the appropriate Service of any candidates who are not selected as shuttle crew members. Upon said notification,

these individuals will be reassigned to their respective Services.

(c) Those potential crew members who successfully complete their training and indoctrination period will be certified by NASA as shuttle crew members, and their respective Services will be so informed. Upon such notification, a five-year tour of duty will commence. Upon completion of said tour, reassignment of these personnel will be made by their respective Service. A one-year tour extension is possible if both NASA and the respective Services agree. The five-year tour can also be shortened if both NASA and the respective Service desire.

IV. STATUS, DIRECTION AND CONTROL

(a) The detail of military members to NASA shall in no way affect the status, office, rank or grade which they may occupy or hold or any emolument, perquisite, right, privilege, or benefit incident to or arising out of any such status, office, rank, or grade.

(b) NASA allocations of manpower spaces will be made by individual Service addenda to this MOU and are subject to annual validation by the Department of Defense.

(c) A military member detailed to NASA shall not be subject to direction by or control by his Service or any officer thereof

directly or indirectly, with respect to NASA responsibilities exercised in the position to which detailed.

(d) Military personnel detailed in accordance with this agreement will be subject to all appropriate regulations and directives of NASA. While detailed to NASA pursuant to this MOU, military members will be subject to NASA regulations concerning standards of conduct of NASA employees as well as those of the Department of Defense.

(e) Military personnel detailed to NASA will remain subject to the Uniform Code of Military Justice and to the policies

and directives of the Military Department concerned with regard to military discipline, leave, flying requirements, and other policies and directives which do not affect responsibilities exercised in NASA. Personnel will be granted sufficient time to satisfy military requirements, including, but not restricted to, annual physicals, accomplishment of practical factors for advancement, annual verification of service records, and certain pay record verifications.

(f) NASA will prepare each military member's fitness, efficiency or effectiveness report

in accordance with the regulations of the member's service.

(g) Promotion policies of the individual Services will continue to apply to shuttle crew members.

(h) The position, duties, or duty station of a person detailed to NASA may be changed only upon mutual agreement of the Service concerned and NASA.

(i) If need arises during the detail for access to a higher level of classified information, the Military Department concerned shall process the necessary clearance. NASA shall process any required special security clearance or authorization which becomes

necessary during the detail, and shall conduct related security debriefings as required.

V. PAY AND REIMBURSEMENT

(a) The Services will pay personnel whom they detail to NASA all normal active duty pay, including hazardous duty pay where applicable, and allowances.

(b) NASA will reimburse the Services for all payments made in accordance with the preceding paragraph and Sections 23003. F.2 and 252, DOD Accounting Guidance Handbook. In addition, interim rates are now in effect governing reimbursement procedures for PCS travel

costs. Pending inclusion of these rates in Section 252 of the Handbook, NASA will reimburse the Services based on the interim rates now in effect.

(c) NASA will pay all travel costs incident to the performance of duties for NASA by personnel detailed to NASA, including costs associated with changes in duty stations.

(d) Reimbursement of travel costs of personnel on detail will be in accordance with Joint Travel Regulations in effect at that time.

(e) The Services will send requests for reimbursement on a

quarterly basis to the administration element within NASA.

S/
Secretary of Defense

DATE: 23 November 1976

S/
Acting Secretary of the Army

DATE: 14 SEP 1976

S/
Acting Secretary of the Navy

DATE: 1976

S/
Acting Secretary of the Air Force

DATE: Aug 16 1976

S/
Administrator, NASA

DATE: Dec. 17, 1976

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JANE J. SMITH, Executrix of the Estate of Michael J. Smith,

Plaintiff,

v.

MORTON THIOKOL, INC., et al.,

Defendants.

CASE NO. 87-398-CIV-ORL-19

ORDER

[FILED MARCH 3, 1988 AT 3:46 P.M.]

This case comes before the Court upon Federal Defendant Mulloy's Motion to Dismiss, and memorandum in support thereof, filed June 19, 1987 (Doc. Nos. 18 and 19); Plaintiff's Memorandum in Opposition to Defendant Lawrence B. Mulloy's Motion to Dismiss, filed July 2, 1987 (Doc. No. 31); Supplemental Memorandum in Support of Motions to Dismiss, filed February 22, 1988 (Doc.

No. 97); and Memorandum in Response to Supplemental Memorandum of Defendants United States of America and Lawrence B. Mulloy, filed July 23, 1987 (Doc. No. 40).

For the reasons expressed in the Order dismissing this case as to Defendant United States of America (entered February 22, 1988), the claims brought pursuant to the Federal Tort Claims Act are also DISMISSED for lack of subject matter jurisdiction as to Defendant Lawrence B. Mulloy. See Doc. No. 96 (entered February 22, 1988); see also Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982), and Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S. 1044 (1980) (wherein courts held Feres doctrine bars suit against civilian federal government

employees when injury to plaintiff occurs during activity incident to military service).

DONE AND ORDERED in Chambers at Orlando, Florida, this 3rd day of March, 1988.

S/
PATRICIA C. FAWSETT
UNITED STATES DISTRICT
JUDGE

Copies to:
W. F. Maready, Esq.
Leon H. Handley, Esq.
Gary W. Allen, Esq.
Larry D. Gregg, Esq.
Kendell W. Wherry, Esq.
Thomas W. Burke, Esq.
John W. Adler, Esq.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JANE J. SMITH, Executrix of the Estate of MICHAEL J. SMITH,	)	
Plaintiff,	)	COMPLAINT
v.	)	REQUEST FOR INJUNCTIVE RELIEF
MORTON THIOKOL, INC.; UNITED STATES OF AMERICA; and LAWRENCE B. MULLOY,	)	DEMAND FOR JURY TRIAL
Defendants	)	

[FILED MAY 6, 1987 AT 10:00 A.M.]

Plaintiff, complaining of defendants, alleges and says:

FIRST CAUSE OF ACTION

I.

Plaintiff's testate, Michael J. Smith, was killed in the accident involving the flight of the space shuttle Challenger, designated STS 51-L, on January 28, 1986. The shuttle was launched from Cape Canaveral, Florida on the morning of January 28, 1986, and

broke up in flight approximately 74 seconds later. Prior to his death Smith was a resident of Harris County, Texas. His wife, Jane J. Smith, has duly qualified as executrix of his estate in Harris County, Texas.

II.

Defendant Morton Thiokol, Inc. ("Thiokol"), is a publicly held Delaware corporation having its principal office and place of business in Chicago, Illinois. It does business throughout the United States, including the state of Florida. Its Aerospace Division does virtually all its business with defendant United States of America ("USA"), supplying a variety of military armaments to the Department of Defense, and solid rocket boosters ("SRBs") to the National Aeronautics and Space Administration ("NASA") and its shuttle program. The Aerospace Division has a

monopoly on approximately forty percent of its products and since the beginning of the shuttle program, has held a monopoly on the sale of SRBs to NASA for its use in the shuttle program.

III.

NASA is a civilian agency of defendant USA, and at all times complained of herein was acting on behalf of this defendant. NASA was created by the National Aeronautics and Space Act of 1958, and its statutory purpose, as amended, is, inter alia, to "plan, direct, and conduct aeronautical and space activities."

IV.

On July 2, 1986 a claim against defendant USA was filed pursuant to the Federal Tort Claims Act. More than six months has expired since the filing of this claim, and no response has been

received. Jurisdiction as to defendant USA arises under 28 U.S.C. § 1346(b).

V.

Defendant Lawrence B. Mulloy is the former Manager of NASA's SRB Project, Marshall Space Flight Center ("Marshall"). He is a resident of Huntsville, Madison County, Alabama.

VI.

Jurisdiction in this action as to defendants Thiokol and Mulloy arises under 28 U.S.C. § 1332 in that there is diversity of citizenship between the parties and the amount in controversy, exclusive of costs, exceeds $10,000.

VII.

In the 1960's NASA began planning what eventually became its shuttle program. The shuttle program centered on a spaceship called a shuttle which in its launch configuration is comprised of three main components. The orbiter is

an airplane-like vehicle which is designed to orbit the earth in space. It carries a crew and cargo. Its three large rocket engines provide about twenty percent of the power which lifts the orbiter from the earth into orbit. The orbiter is attached to the second component, the external tank. It contains two inner tanks, one containing liquid oxygen and the other containing liquid hydrogen, the fuel for the orbiter's engines. An SRB is attached to the external tank on each side of the orbiter. The two SRBs provide approximately eighty percent of the required thrust to place the orbiter in orbit.

VIII.

Upon launch of the shuttle, the SRBs provide propulsion for approximately two minutes. They then separate from the vehicle and descend by parachute to the ocean where they are

retrieved and subsequently reused by Thiokol in the later assembly of other SRBs.

IX.

In the mid-1970's, NASA received proposals for the supply of the SRBs. Four companies, including Thiokol, submitted proposals. Even though Thiokol's proposal was less favorable in most respects and proved to be more expensive than the other bids submitted by competitors, NASA awarded the contract to Thiokol. On information and belief, Thiokol's award of the contract was the direct result of political influences which resulted in favcritism in the award process.

X.

NASA's Marshall center in Huntsville, Alabama was given the responsibility of supervising Thiokol in the performance of the SRB contract.

XI.

The SRBs furnished by Thiokol under the above-mentioned contract were composed of a solid rocket motor ("SRM") and other components. The SRMs were made up of four cylindrical segments which were shipped by Thiokol to the Kennedy Space Center at Cape Canaveral, Florida. On assembly of the SRM, the segments were stacked on top of one another and joined together in the field at Kennedy Space Center by means of three field joints.

XII.

Each of the field joints was a tang-and-clevis connection, with the tang of each upper segment fitting into the clevis of the lower section. Two O-ring seals of cylindrical synthetic rubber about a quarter of an inch in diameter were used to seal the joints against leaks of the hot gases from the

chamber of the rocket. Since the hot gases in the SRB reach almost 6,000 degrees fahrenheit, a zinc chromate putty was used between each of the SRB segments to provide a thermal barrier between the rubber O-rings and the hot fire from the chamber of the rocket. A fourth joint, referred to as the nozzle joint, was located aft of the field joints. It was similar in design but different from the field joints.

XIII.

As early as 1977, NASA and Thiokol learned that when ignition pressures were applied to the rocket, the field joints expanded and moved in a manner which caused the inside clevis arm to move away from its mated tang of the upper segment. This movement came to be referred to as "joint rotation." The phenomenon violated the performance

requirements of the joint. Joint rotation created a potential for the O-rings failing to seal, which would cause a leak of hot gases from the chamber of the rocket to the outside, which would result in melting the wall of the rocket. Once a leak started, it was universally accepted that the heat would burn through the wall of the SRB in a matter of seconds, with various scenarios then possible, all disastrous and all almost certain to result in conflagration and death of the crew.

XIV.

The joint rotation problem of the field joints was aggravated by other factors. Among other things, the O-rings lost their capacity to act as seals as they became colder. The insulating putty barrier between the hot fires of the rocket chamber and the rubber seals changed its plastic quality

in response to humidity and when exposed to moisture, it disintegrated. Variances in the size and roundness of the SRM segments created fittings which were sometimes too loose and other times too tight to enable sealing of the joints. In addition, the shape of the SRB segments at the time of launch was further distorted by a buckling load phenomenon known as "twang."

XV.

These and other deficiencies of the field joints were truly life and death matters. Nevertheless, NASA officials at Marshall and Thiokol entered into a deliberate and wilful conspiracy of silence and deceit designed to fraudulently conceal the problems of the SRB joints from the public, the Congress and the crew members who would unknowingly risk their lives to fly the shuttle.

XVI.

The above deficiencies of the SRB field joints were unknown to and concealed from plaintiff's testate and the other crew members of the space shuttle Challenger on flight STS 51-L. Plaintiff's testate was a highly skilled, uniquely qualified professional pilot with a masters degree in aeronautical engineering who, along with other members of the Challenger crew, should have been consulted and informed with respect to the problems associated with the SRB field joints prior to the launch on January 28, 1986. Nevertheless, plaintiff's testate and the other members of the Challenger crew were never informed of the field joint deficiencies nor were they otherwise informed of the danger they represented. For the reasons set out below, defendants had made the conscious decision to

conceal, obscure and hide the very facts which caused the deaths of the Challenger crew.

XVII.

Beginning in 1977 and continuing up to the time of the Challenger accident, some Thiokol and NASA engineers repeatedly initiated actions to correct the life-threatening deficiencies in the SRB field joints. In every instance, their pleas were ignored and their efforts thwarted by their superiors.

XVIII.

When the SRB segments of the second shuttle launch were disassembled in December 1981, it was found that the hot flames from the SRB had reached the O-rings in the field joints, seriously damaging them. Between such time and the accident on January 28, 1986, the instances of heat distress increased, at first slowly, and then in the final two

years, at an alarming rate in terms of frequency in the instances and severity of damage to the O-ring seals. All of the launches in colder weather resulted in heat damaged seals. Nevertheless, the conspiracy of silence and deceit on the part of Thiokol and NASA's Marshall Space Flight Center continued, with the result that knowledge of the problem was effectively contained at Thiokol and at Marshall. Even when an inquiry to either Thiokol or NASA officials at Marshall was raised, the response was, in essence, that the SRB field joints were safe even though they knew that they were not.

XIX.

Two flights of the shuttle, one in January 1985, and the other in April 1985, were accompanied by substantial and alarming heat damage to the SRB seals. As a result of pressures brought

to bear by some officials of NASA, Thiokol finally appointed a "Seal Task Force," a group of in-house engineers, to study and remedy the problem with the seals. NASA unreasonably relied on the Thiokol task force to eliminate the problems with the seals, ostensibly because Thiokol had the superior expertise and facilities to address the deficiencies. Although members of the Seal Task Force entered into their task with great enthusiasm and dedication, they were not supported by management, were not able to obtain the resources from Thiokol necessary to do their work and hence accomplished nothing.

XX.

Because of the serious risk posed by the burnt seals in the SRBs on the January and April 1985 flights, NASA headquarters in Washington, D.C. finally became involved and called a meeting in

Washington on August 19, 1985. The meeting was attended by top officials of the SRB program at Marshall and by Thiokol representatives.

XXI.

At this meeting, Thiokol represented that it understood the dynamics of the SRB field joints, outlined a presumed sequence of the dynamics of joint rotation, and assured NASA that the shuttle was safe to fly. Thiokol also represented that its conclusions were supported by "analyses" which it did not in fact have and which did not in fact exist, at least to the extent of supporting the conclusions reached. NASA officials at Marshall again unreasonably relied on the Thiokol conclusions. Thiokol knew and the Marshall officials had reason to know that it was not safe to fly the shuttle and knew or should have known that a disastrous

accident was likely and in fact inevitable. In fact, both NASA and Thiokol had been so advised by their engineering staffs.

XXII.

The resolution of this meeting was that an effort should be made to find an expeditious solution to the joint problem, but that in the meantime the shuttle flights should continue. The only definitive action taken was to continue testing the seals after assembly of the SRBs by inserting compressed gas into the joints at 200 pounds per square inch for the ostensible purpose of determining whether the O-rings would seat as of the time the test was made.

XXIII.

At the time NASA and Thiokol instituted the 200 pounds per square inch leak check test in the SRB joints, they knew that the air pressure would blow

holes in the insulating putty, creating a pathway between the hot fire in the chamber of the SRB to the O-rings in the field joints. From the time such practice was initiated, every shuttle flight was accompanied by heat damaged O-rings, and on each of such occasions, there was a blow-hole leading from the rocket chamber to the place where the O-ring was damaged. Both NASA and Thiokol knew that the 200 pounds per square inch leak check test did not correct any problems of the seals, but in fact created a likelihood of seal damage and disaster from that cause alone, and that this test was merely designed to mislead those not familiar with the problems to believe that they were being properly addressed.

XXIV.

Over a period of eight years of apparent but meaningless efforts and the

generation of large volumes of paperwork, neither NASA nor Thiokol did anything to correct any of the aforesaid problems of the SRB field joints. Through the date of the accident on January 28, 1986, when plaintiff's testate was killed, the problems persisted with the same or greater severity than when they were first recognized in 1977.

XXV.

Plaintiff's testate was a Navy pilot when he was assigned and loaned to NASA in 1980 as an astronaut candidate. During the summer of 1985, he was assigned by NASA to be the pilot of shuttle mission STS 51-L, the twenty-fifth shuttle flight. The orbiter for that flight was Challenger. Mission 51-L is sometimes referred to below as "Challenger."

XXVI.

On the early afternoon of January 27, 1986, engineers at Thiokol's Wasatch, Utah facility who had been actively involved in the Seal Task Force, learned that a cold front was approaching Cape Canaveral in Florida, that the temperatures during the night were forecast to be in the teens (Fahrenheit), and that at scheduled launch time the next day they were forecast to be in the twenties.

XXVII.

Upon learning of the forecast weather conditions at Cape Canaveral, the Thiokol engineers immediately organized a meeting of their engineering department. The focal point of the meeting was consideration of the inability of the SRB seals to seal the field joints in the forecast cold temperatures. The cold caused the

O-rings to lose their resiliency and pliability, on which proper sealing depended. After careful consideration, the engineers concluded that in view of the cold forecast, it would be extremely hazardous to launch Challenger on January 28th. Thiokol therefore issued a recommendation not to launch. The recommendation was transmitted to and received by NASA at the Kennedy Space Center on the late afternoon of January 27, 1986.

XXVIII.

NASA's fixed launch procedure was that for a launch to take place, each of the major component manufacturers, including Thiokol, had to recommend the launch. If one such component manufacturer did not recommend in favor of the launch, it was cancelled.

XXIX.

In response to the recommendation of Thiokol not to launch, a teleconference was scheduled for the same evening, January 27th. The meeting got under way at approximately 8:45 p.m. Eastern Standard Time. The teleconference connected representatives of Thiokol at its Wasatch, Utah facility with NASA officials at two of its space centers: Marshall in Huntsville, Alabama and the Kennedy Space Center at Cape Canaveral, Florida. Thiokol representatives were also present at Kennedy on the teleconference connection. The Thiokol representatives at Wasatch included two vice-presidents of its Aerospace Division whose presence was never disclosed to the other participants in the teleconference. Thiokol's representatives also included Joe C. Kilminster, Vice-President of Thiokol's space

boosters programs, the vice-president of engineering and ten of its engineers knowledgeable of the SRBs, including the head and other members of the Seal Task Force. NASA representatives included senior officials at Marshall. Defendant Mulloy, NASA's manager of the SRB project at Marshall, was present along with George B. Hardy, deputy director of science and engineering at Marshall.

XXX.

The Thiokol engineers began the meeting by explaining their position that the launch in the cold temperatures should be cancelled. There then ensued a debate, the essence of which was the likelihood of the Challenger exploding if it were launched the next day as scheduled, with the NASA officials opposing the recommendation of the Thiokol engineers. Approximately one and one-half hours into the meeting,

Mulloy asserted that the Thiokol engineers had no right to add "new" launch criteria on the eve of the launch, and questioned them as to whether they expected him to wait until April to launch the shuttle. Deputy director George B. Hardy asserted that he was "appalled" at the negative recommendation of the Thiokol engineers.

XXXI.

Finally, Joe C. Kilminster, Vice-President of Thiokol's Space Booster Programs, stated that Thiokol wanted to have a caucus off the line for five minutes. The Thiokol connection went off the line for a period of approximately 30 minutes. The Thiokol management representatives who were present, as noted above, asserted that a management as opposed to engineering decision had to be made and thereupon had a

meeting among themselves to the exclusion of the engineers. Some of the engineers, feeling very strongly that launch of the shuttle would create a serious hazard of seal leakage with the consequent explosion of the vehicle, persisted in trying to assert themselves with the management group, but they were ignored. Finally, the three vice-presidents reversed the recommendation of their engineering department and agreed to recommend the launch. They then came back on the line and stated to NASA that they had re-evaluated the data and were now ready to recommend the launch. At George Hardy's insistence, the recommendation was put in writing and telefaxed to the Kennedy Space Center at Cape Canaveral, Florida, where it arrived during the late night of January 27, 1986.

XXXII.

After the recommendation to launch had been made, some of the Thiokol engineers continued to argue with their superiors against the launch because of other weather conditions which obtained at the time. These conditions included the fact that most of the structure supporting the shuttle on its pad was covered with ice, some of it several inches in thickness and including icicles as much as two feet in length hanging all over the structure. In fact, portions of the emergency exit for the crew of the Challenger were covered with a coating of ice, which would have prevented the astronauts from reaching their escape baskets in the event of an emergency. Nevertheless, the recommendation not to launch on the basis of the ice on the pad was rejected.

XXXIII.

An engineering recommendation was also made that the launch be cancelled by reason of fact that the two recovery ships at sea which were to recover the SRBs were in a survival mode by reason of heavy seas and were headed back to the shelter of the shore. The fact that the recovery ships would not be in the recovery area and the fact that gale to hurricane category winds were blowing made it likely that the parachutes for the boosters and other portions of the boosters would be lost at an acknowledged cost of over $1 million. Nevertheless, the recommendation not to launch on that basis was also rejected.

XXXIV.

Shuttle STS 51-L was assembled and then taken to the launch pad some thirty-five days prior to January 28, 1986. During the 35 days on the launch

pad, Challenger was exposed to the elements, including extreme variations in temperatures and more than 7½ inches of rain. Rainwater and moisture collected in the SRB field joints. On the day prior to the launch on January 28, 1986, the shuttle was subjected to heavy winds and rains. All of such weather conditions were without precedent for the launch of a shuttle flight.

XXXV.

On the day of the launch, January 28, 1986, Cape Canaveral, Florida continued to experience unprecedented weather conditions. These included record-setting temperatures measured as low as 8° fahrenheit, heavy freezing and icing conditions, and strong and gusting surface winds and winds aloft, with severe turbulence and wind shear conditions. No shuttle launch had ever

been attempted under such adverse weather conditions.

XXXVI.

Challenger was launched at approximately 11:38 a.m. on January 28, 1986. The seals at the aft field joint of the right SRB failed to seal the joint. A leak developed in the joint and at 58 seconds into the flight, hot flames spewed from a hole in the side of the SRB. The flames from the side of the SRB joint disabled the shuttle, and at 74 seconds into the flight, the hydrogen and oxygen in the external tank exploded, enveloping the orbiter and the rest of the shuttle in a huge conflagration.

XXXVII.

The negligence of each of the defendants was the sole proximate cause of the accident and the injury and death

of plaintiff's testate in the foregoing and following particulars:

1. Defendant Thiokol wrote or participated in the writing of the temperature specifications for the shuttle which required, among other things, that the shuttle not be operated with the cold temperatures which obtained, and then violated such temperature specifications by launching the shuttle when the temperature was much lower than the specifications permitted, and NASA allowed and participated in the violation of the specifications by launching the shuttle on the morning of January 28, 1986;

2. At the teleconference meeting the night before the launch, NASA asserted that Thiokol was creating new launch criteria on the eve of launch when in fact the launch criteria prohibiting the launch already existed, and

both NASA and Thiokol knew or should have known that they did exist and nevertheless proceeded as if there were no such criteria;

3. Defendants allowed and participated in the launch of the shuttle on the morning of January 28, 1986 when they knew or should have known that the weather conditions which had obtained for the past several hours and for the past 35 days would cause the insulating putty in the joint to disintegrate and fail to properly protect the joint from the tremendous heat from the SRB chamber;

4. Defendants ignored the warnings of the Thiokol engineers not to launch the vehicle because of the likelihood that the vehicle would explode by reason of the influence of the cold temperatures on the seals and the joints which made it impossible for

the seals to function properly and seal the joints;

5. In making the decision to launch, defendants failed to even consider the influence of ice in the SRB joints when they knew or should have known that such ice would make the proper sealing of the joints impossible;

6. Defendants failed to perform required tests of the SRBs for operation in the conditions which existed at the time of launch on January 28, 1986, and launched the vehicle with the knowledge that such tests had not been done;

7. Defendants launched the shuttle when they knew or should have known that the seals in the joints were hazardous by reason of inherent defects therein and by reason of the fact that the seals being used were not intended for the purpose to which they were being applied;

8. Defendants knowingly increased the risk of hazard by injecting air pressure into the joints at 200 pounds per square inch, which caused blow-holes through the insulating putty that created a pathway for the hot flames from the SRB chamber to the joint O-rings, destroying them and allowing the joint to leak;

9. Defendants continued to use the same insulating putty in the field joints after they knew or should have known that the putty failed to adhere to its surfaces and disintegrated upon being exposed to moisture, the result of which was that there was no effective insulating barrier between the flame of the rocket and the joints;

10. Defendants disregarded and ignored the advice of competent and knowledgeable engineers to the effect that the shuttle would likely blow up

with the loss of all persons onboard should the shuttle be launched under all of the conditions which obtained at the time;

11. Defendants withheld all information regarding known problems and hazards of the SRB joint seals from plaintiff's testate and the rest of the Challenger crew and failed to warn them of the SRB joint problems;

12. Defendants knew or should have known that the combination of factors which existed at the time, i.e., SRB joint rotation, the twang phenomenon, the breakdown of the insulating putty used to protect the joints against the heat of the SRB, the freezing and stiffness of the O-rings, the ice in the joints, the out-of-roundness of the segments, would make it a practical impossibility for all of the joints to

seal, yet recommended and ordered the launch of the vehicle; and

13. Defendants launched the shuttle when they knew or should have known that the high wind velocities, severe turbulence and wind shear conditions would increase the hazard of seal leakage from the SRB field joints.

XXXVIII.

As the proximate result of defendants' negligence as set forth above, plaintiff's testate suffered personal injuries from the explosion of Challenger and its fall to the earth and lost his life. At the time of his death, Michael Smith was 40 years old and in excellent health. He is survived by his wife, Jane J. Smith, age 40, the executrix herein, his son Scott, age 17, and his daughters Alison, age 14, and Erin, age 8.

XXIX.

Plaintiff's testate and his wife and children comprised a uniquely close, loving and active family. The surviving family members were totally dependent on their husband and father for their financial and material support. They were also dependent on his loving counsel, guidance, companionship and, very importantly, his inspiration.

XL.

Plaintiff is entitled to recover on behalf of the estate of Michael J. Smith all medical or funeral expenses which were paid on his behalf. In addition, plaintiff is entitled to recover on behalf of herself as surviving spouse and the three minor children of plaintiff's testate the value of future loss of support and services from the date of Michael Smith's death and the net accumulations of his estate. Plaintiff

is also entitled to recover on behalf of herself as surviving spouse for loss of the companionship and protection of Michael J. Smith and for mental pain and suffering from the date of his death. Plaintiff is also entitled to recover on behalf of the minor children of Michael J. Smith for loss of parental companionship, instruction and guidance and for mental pain and suffering from the date of his death.

XLI.

Plaintiff is entitled to recover of defendants, jointly and severally, for the personal injuries and wrongful death of Michael Smith the sum of Five Hundred Million Dollars ($500,000,000.00).

SECOND CAUSE OF ACTION

XLII.

The allegations contained in the First Cause of Action are incorporated herein.

XLIII.

In the case of defendant Thiokol, the motive for its above described conduct was money. The SRB contract was a multi-billion dollar monopoly, which would have been jeopardized by the revelation of the above described deficiencies. Further, incentive awards exceeding $50-75 million dollars per year which would otherwise be paid to Thiokol under its cost-plus contract would have been forfeited if the shuttle program were delayed by problems with the SRB field joints.

XLIV.

In the case of defendants USA and Mulloy, the motive was also money, in the form of incentive bonuses to senior officials at Marshall, along with their documented recommendations and collusive commitments to the original Thiokol contract. Their personal standings were

at stake by reason of previously praising and recommending the Thiokol contract to Congress in order to continue funding to finance their jobs and incentive bonuses.

XLV.

During the latter part of 1985 and into 1986, Thiokol was negotiating with NASA with respect to the third purchase of SRBs from Thiokol, a contract which was worth billions of dollars to Thiokol. Any indication from Thiokol that its SRBs were unsafe to fly in cold weather would have seriously jeopardized its further participation in the shuttle program and caused a loss of billions of dollars in business.

XLVI.

Thiokol's conduct as set forth hereinabove was wilful, wanton, malicious and intentional and done with reckless disregard for human life for

the sole purpose of protecting its monopoly in the supply of SRBs to NASA and its very lucrative SRB contract with NASA, a business interest which was worth billions of dollars to Thiokol. In recommending the launch of the Challenger shuttle on January 28, 1986, Thiokol knew that it was placing plaintiff's testate and the other crew members in imminent peril of death.

XLVII.

Plaintiff is therefore entitled to recover punitive damages of defendant Thiokol. Thiokol has a net worth, upon information and belief, of at least One Billion - Dollars ($1,000,000,000.00). Such punitive damages should be no less than the profits which Thiokol has earned in its Aerospace Division since it acquired the contract for providing the SRBs, plus the amount of so-called incentive award payments it has received

from NASA under the contract. Plaintiff is therefore entitled to recover of defendant Thiokol the sum of at least One Billion Dollars ($1,000,000,000.00) in punitive damages.

THIRD CAUSE OF ACTION

XLVIII.

The allegations contained in the First Cause of Action are incorporated herein.

XLIX.

Defendants Thiokol and USA expressly warranted to plaintiff's testate and the Challenger crew that the shuttle and its component SRBs were safe to fly and that they were certified for launch under the conditions existing on January 28, 1986. In particular, these defendants expressly warranted that the SRB field joints would provide an adequate seal to prevent hot combustion

gases from leaking through the SRB joints during operation.

L.

These defendants breached their express warranty because the shuttle and its component SRBs were not certified for launch and were not safe to fly on January 28, 1986, particularly under the conditions existing at the time. Specifically, these defendants breached this express warranty when the right SRB aft field joint failed upon launch. Defendants have been given timely notice of breach of these express warranties.

LI.

As a proximate result of this breach of express warranties, plaintiff has been damaged in the amount of Five Hundred Million Dollars ($500,000,000.00), which sum plaintiff is entitled to recover of defendants Thiokol and USA, jointly and severally.

FOURTH CAUSE OF ACTION

LII.

The allegations contained in the First and Third Causes of Action are incorporated herein.

LIII.

Defendants Thiokol and USA impliedly warranted to plaintiff's testate and the Challenger crew that the shuttle and its components SRBs were merchantable and fit for the ordinary and particular purposes for which they were designed and required, which was to provide a safe launch and to prevent the leakage of hot combustion gases through the SRB field joints.

LIV.

These defendants breached their implied warranties of merchantability and fitness because the shuttle was not safe to fly and because the right SRB aft field joint failed upon launch.

Plaintiff gave timely notice of breach of these implied warranties to these defendants.

LV.

As a proximate result of the breach of implied warranties, plaintiff has been damaged in the amount of Five Hundred Million Dollars ($500,000,000.00), which sum plaintiff is entitled to recover of defendants Thiokol and USA, jointly and severally.

FIFTH CAUSE OF ACTION

LVI.

The allegations contained in the First, Third and Fourth Causes of Action are incorporated herein.

LVII.

The Challenger shuttle manufactured and assembled by defendants Thiokol and USA was defective and unfit as set forth above for the purpose for which it was used in the NASA space program.

LVIII.

As a proximate result of the above deficiencies in the Challenger shuttle, the right SRB aft field joint failed upon launch, causing the death of plaintiff's testate. Defendants Thiokol and USA are therefore strictly liable to plaintiff for the wrongful death of Michael Smith, entitling plaintiff to recover of these defendants, jointly and severally, the sum of Five Hundred Million Dollars ($500,000,000.00).

SIXTH CAUSE OF ACTION

LIX.

The allegations contained in the First through Fifth Causes of Action are incorporated herein.

LX.

Jurisdiction further arises under this cause of action pursuant to 28 U.S.C. § 1331 in that a federal question is presented herein.

LXI.

Despite the negligence and misconduct of Thiokol and its repeated and fraudulent misrepresentations as to its contract performance, which with respect to the seals in the SRBs has been totally derelict as set forth above, Thiokol continues to enjoy an exclusive and monopolistic arrangement with NASA for the production and manufacture of SRBs for the shuttle program. The Challenger disaster has done nothing to diminish Thiokol's favored position with NASA in the shuttle program, and these defendants will continue to manufacture and certify inadequately designed and defective SRBs without compliance with specifications or proper safeguards or warning to prevent the kind of tragedy which occurred with the Challenger in future shuttle flights unless Thiokol's

existing contract with NASA is set aside and Thiokol is barred from further work thereunder.

LXII.

In fact, Thiokol has now represented to NASA that the SRB field joints in question can be fixed with modifications recommended by Thiokol. The fact is that these joints are so fundamentally and basically unsound that it is impossible for them to be fixed.

LXIII.

Since the onset of this contract, NASA has demonstrated a collusive inability to objectively monitor and maintain proper and adequate design and production standards and procedures, and will take no action internally to remedy these deficiencies on its own. Plaintiff therefore has no adequate remedy at law, and is aggrieved because the family of Michael J. Smith has suffered and

will continue to suffer mental and emotional distress and harm unless injunctive relief is imposed. The shuttle program is unsafe and will be irreparably damaged, with further loss of life and the expenditure of exorbitant contract sums unless Thiokol is debarred from its existing contract with NASA.

LXIV.

NASA's ongoing refusal to debar Thiokol from its SRB contract is contrary to law, without rational basis and an abuse of that agency's discretion.

LXV.

Plaintiff is therefore entitled to equitable relief permanently enjoining defendants Thiokol and USA from further performance under the existing SRB contract, debarring Thiokol from further work in the shuttle program.

WHEREFORE, plaintiff respectfully prays the court that:

1. Plaintiff have and recover of defendants, jointly and severally, the sum of Five Hundred Million Dollars ($500,000,000.00) in actual damages;

2. Plaintiff have and recover of defendant Thiokol the sum of at least One Billion Dollars ($1,000,000,000.00) in punitive damages;

3. Defendants Thiokol and USA be permanently enjoined from further performance under the existing SRB contract, that defendant Thiokol be debarred from further work under the shuttle program and that defendant USA be compelled to reopen SRB production for competitive bidding by other responsible manufacturers;

4. The costs of this action, including reasonable attorneys' fees, be

taxed against defendants, jointly and severally;

5. All issues of fact be submitted to and tried by a jury as to defendants Thiokol and Mulloy; and

6. The court grant such other and further relief as shall be just and proper.

This the 6 day of May, 1987.

S/
W. F. Maready
TRIAL COUNSEL

S/
W. Thompson Comerford, Jr.

S/
G. Gray Wilson

OF COUNSEL:

PETREE STOCKTON & ROBINSON
1001 West Fourth Street
Winston-Salem, NC 27101
Telephone: (919) 725-2351

S/
Leon H. Handley

OF COUNSEL:

GURNEY & HANDLEY, P.A.
Landmark Center Two
225 East Robinson Street
Suite 450
Post Office Box 1273
Orlando, Florida 32802
Telephone: (305) 843-9500

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JANE J. SMITH, Executrix of the Estate of MICHAEL J. SMITH, Plaintiff,	)	No.: 87-398-CIV-ORL-19
v.	)	AFFIDAVIT
MORTON THIOKOL, INC.; UNITED STATES OF AMERICA; and LAWRENCE B. MULLOY, Defendants.	)	

[FILED JULY 2, 1987 AT 2:43 P.M.]

The undersigned being duly sworn deposes and says:

I am Jane J. Smith, executrix of the estate of Michael J. Smith and plaintiff herein. I was married to Michael Smith for 18½ years prior to his death as a result of the Challenger shuttle accident on January 28, 1986. At the time of his death, my husband was

a commander in the United States Navy on assignment to NASA as an astronaut in the shuttle program since 1980.

From the time my husband was assigned to NASA, he received no further orders from the Navy. His work and his activities were at the total direction and control of civilian employees of NASA. He was under no military constraints or restrictions and participated in no military activities. He had no commanding officer, made no reports to any military officer or facility, and used no Navy property or equipment in his work.

While in training as an astronaut at NASA, my husband worked in NASA facilities or facilities provided by parties under contract with NASA. He was supervised, instructed and evaluated by NASA personnel. He was subject to NASA guidelines and regulations, adhered

to a daily schedule prepared by NASA and made public appearances and trips on behalf of NASA to promote the space program. During these appearances NASA approved the content of his remarks and provided him with materials concerning public statements about the space program. His likeness was made available to and used by NASA in the promotion of the space program.

In the furtherance of his work for NASA, my husband used and worked with equipment owned by NASA. The airplanes he flew were owned, operated and maintained by NASA and his use of them was subject to the direct control of NASA. Such aircraft were painted in NASA colors with a NASA insignia and other NASA markings. His work-related expenses were paid by NASA. He wore NASA clothes, including flight suits and flight gear provided by NASA. Such

items bore the NASA insignia. If my husband was not wearing NASA clothing while assigned to that agency, he wore civilian dress. He carried a NASA identification card in his wallet and while at various NASA facilities wore an identification card pinned to the outside of his clothing.

At the time of his death, my husband was pilot of the space shuttle Challenger. The space shuttle was owned and operated by NASA. As pilot, my husband was second in command of the flight of the shuttle. Mr. Richard Scobee was the commander of the flight and had absolute authority over the flight and the activities of my husband as pilot, and my husband was subject to Mr. Scobee's commands. Mr. Scobee was a civilian employee of NASA.

This the 25 day of June, 1987.

S/
Jane J. Smith

SWORN TO and subscribed
before me, this the 25
day of June, 1987.

Anita S. Cioni
Notary Public

My commission expires:

4/16/87

STATUTES

5 U.S.C.A. § 702 (West 1977). Right of review

A person suffering legal wrong because of agency action, or adversely affected cr aggrieved by agency action within the meaning of a relevant statue, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States:

Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing here (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

28 U.S.C.A. § 1346 (West 1976). United States as defendant.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the

Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 2671 (West Supp. 1989). Definitions.

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency"

includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States and corporations primarily acting as instrumentalitites or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504 or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a

member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 U.S.C.A. § 2672 (West Supp. 1989). Administrative adjustment of claims.

The head of each federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to

the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in

an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C.A. § 2674 (West 1965 & Supp. 1989). Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the

Tennessee Valley authority is entitled under this chapter.

28 U.S.C.A. § 2676 (West 1965). Judgment as bar.

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C.A. § 2679 (West Supp. 1989). Exclusiveness of Remedy.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or

omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government -

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

28 U.S.C.A. § 2680 (West 1965 & Supp. 1989). Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to-

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of

the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering

the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall

apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

41 U.S.C.A. § 403 (West Supp. 1989). Definitions.

As used in this chapter-

(7) the term "responsible source" means a prospective contractor who-

(C) has a satisfactory performance record;

(D) has a satisfactory record of integrity and business ethics;

42 U.S.C.A. § 2451 (West 1973). Congressional declaration of policy and purpose.

(b) The Congress declares that the general welfare and security of the United States require that adequate provision be made for aeronautical and space activities. The Congress further declares that such activities shall be the responsibility of, and shall be directed by, a civilian agency exercising control over aeronautical and special activities sponsored by the United States, except that activities peculiar to or primarily associated with the development of weapons systems, military operations, or the defense of the United States (including the

research and development necessary to make effective provision for the defense of the United States) shall be the responsibility of, and shall be directed by, the Department of Defense; and that determination as to which such agency has responsibility for and direction of any such activity shall be made by the President in conformity with section 2471(e) of this title.

42 U.S.C.A. § 2472 (West 1973). National Aeronautics and Space Administration Establishment; appointment and duties of Administrator.

(a) There is established the National Aeronautics and Space Administration (hereinafter called the "Administration"). The Administration shall be headed by an Administrator, who shall be appointed from civilian life by the President by and with the advice and

consent of the Senate. Under the supervision and direction of the President, the Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Administration, and shall have authority and control over all personnel and activities thereof.

Deputy Administrator; appointment and duties.

(b) There shall be in the Administration a Deputy Administrator, who shall be appointed from civilian life by the President by and with the advice and consent of the Senate and shall perform such duties and exercise such powers as the Administrator may prescribe. The Deputy Administrator shall act for, and exercise the powers of, the Administrator during his absence or disability.

Restriction on engaging in any other business, vocation, or employment

(c) The Administrator or the Deputy Administrator shall not engage in any other business, vocation, or employment while serving as such.

REGULATIONS

14 C.F.R. § 1214.702 (1989) Authority and responsibility of the STS commander.

(a) During all flight phases of an STS flight, the STS commander shall have the absolute authority to take whatever action is in his/her discretion necessary to (1) enforce order and discipline, (2) provide for safety and well being of all personnel on board, and (3) provide for the protection of the STS elements and any payload carried or serviced by the STS. The commander shall have authority throughout the flight to use any reasonable and necessary means, including the use of physical force, to achieve this end.

(b) The authority of the commander extends to any and all personnel on board the Orbiter including Federal officers and employees and all other

persons whether or not they are U.S. nationals.

(c) The Authority of the commander extends to all STS elements and payloads.

(d) The commander may, when he/she deems such action to be necessary for the safety of the STS elements and personnel on board, subject any of the personnel on board to such restraint as the circumstances require until such time as delivery of such individual or individuals to the proper authorities is possible.

14 C.F.R. § 1214.703 (1989). Chain of command.

(a) The Commander is a career NASA astronaut who has been designated to serve as commander on a particular flight, and who shall have the authority and responsibility described in §

1214.702 of this subpart. Under normal flight conditions (other than emergencies or when otherwise designated) the STS commander is responsible to the Flight Director, Johnson Space Center, Houston, TX.

(b) The pilot is a career NASA astronaut who has been designated to serve as the pilot on a particular flight and is second in command of the flight. If the commander is unable to carry out the requirements of this subpart, then the pilot shall succeed to the duties and authority of the commander.

(c) Before each flight, the other flight crew members (Mission Specialists) will be designated by the Director of Flight Operations, Johnson Space Center, Houston, TX, in the order in which they will assume the responsibilities and authority of the

commander under this subpart in the event that the commander and pilot are both not able to carry out their duties.

(d) The determinations, if any, that a crew member in the chain of command is not able to carry out his or her command duties and is therefore to be relieved of command, and that another crew member in the chain of command is to succeed to the responsibilities and authority of the Commander, will be made by the Director of the Johnson Space Center.

14 C.F.R. § 1214.704 (1989). Violations.

(a) All personnel on board an STS flight are subject to the authority of the commander and shall conform to his/her orders and direction as authorized by this subpart.

(b) This regulation is a regulation within the meaning of 18 U.S.C. 799, and

whoever willfully violates, attempts to violate, or conspires to violate any provision of this subpart of any order or direction issued under this subpart shall be fined not more than $5,000 or imprisoned not more than 1 year, or both.

48 C.F.R. § 9.103 (1988), Policy.

(a) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.

(b) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. If the prospective contractor is a small

business concern, the contracting officer shall comply with Subpart 19.6, Certificates of Competency and Determinations of Eligibility. (If Section 8(a) of the Small Business Act (15 U.S.C. 637) applies, see Subpart 19.8)

(c) The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer. A prospective contractor must affirmatively demonstrate its responsibility, including, when

necessary, the responsibility of its proposed subcontractors.

48 C.F.R. § 9.104-1 (1988) General standards.

To be determined responsible, a prospective contractor must-

(c) Have a satisfactory performance record (see 9.104-3(c));

(d) Have a satisfactory record of integrity and business ethics;

48 C.F.R. § 9.104-3 (1988), Application of standards.

(c) Satisfactory performance record. A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the

contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. The contracting officer shall consider the number of contracts involved and extent of deficiency of each in making this evaluation. Prior compliance with subcontracting plans required by Subpart 19.7 shall be considered in determining the responsibility of an offeror bidding on a contract requiring a subcontracting plan.

48 C.F.R. § 9.402 (1988), Policy.

(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this

subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.

(c) Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart.

48 C.F.R. 9.405-1 (1988), Continuation of current contracts.

(a) Notwithstanding the debarment or suspension of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor

was debarred or suspended, unless the acquiring agency's head or a designee directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.

(b) Agencies shall not renew current contracts or subcontracts of debarred or suspended contractors, or otherwise extend their duration, unless the acquiring agency's head or a designee states in writing the compelling reasons for renewal or extension.

48 C.F.R. § 9.406-1 (1988), General.

(a) The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using

the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors should be considered in making any debarment decision. In this connection, the supplying of information by the contractor to the Government pursuant to the Anti-Kickback Act of 1986 (see 3.502) shall be favorable evidence of the contractor's responsibility.

(b) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or commodities. The debarring official may extend the debarment decision to include any affiliates of

the contractor if they are (1) specifically named and (2) given written notice of the proposed debarment and an opportunity to respond (see 9.406-3(c)).

(c) A contractor's debarment shall be effective throughout the executive branch of the Government, unless an acquiring agency's head or a designee states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

48 C.F.R. § 9.406-2 (1988), Causes for debarment.

The debarring official may debar a contractor for any of the causes listed in paragraphs (a) through (c) following:

(a) Conviction of or civil judgment for-

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or

(iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as-

(1) Willful failure to perform in accordance with the terms of one or more contracts; or

(2) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(c) Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

48 C.F.R. § 1809.405-1 (1988), Continuation of current contracts.

(a) The contracting officer may terminate a contract under FAR 9.405-1(a) if it is in the best interest of the Government to do so, unless directed otherwise by the Assistant Administrator for Procurement.

(b) If it is believed that an existing contract or subcontract with a

debarred or suspended contractor must be renewed or otherwise extended, the Procurement Officer shall prepare a determination with all necessary support documentation and forward it to the Assistant Administrator for Procurement (Code HP-1) for approval. If approved, the Assistant Administrator shall forward a notice describing the decision to the GSA Office of Acquisition Policy. Some examples of circumstances that may constitute a compelling reason under FAR 9.405-1(b) for award, renewal, or extension include-

(1) The property or services to be acquired are available only from the listed contractor;

(2) The urgency of the requirement dictates that NASA deal with the contractor;

(3) The contractor and NASA have entered into an agreement covering the

same events which resulted in the listing, and the agreement includes a decision by NASA not to debar or suspend the contractor; and

(4) For such other reasons related to the national defense or program requirements which necessitate continued business dealings with the listed contractor.

38 § 105 (West Supp. 1989). Line of duty and misconduct.

(a) An injury or disease incurred during active military, naval, or air service will be deemed to have been incurred in line of duty and not the result of the veteran's own misconduct when the person on whose account benefits are claimed was, at the time of the injury was suffered or disease contracted, in active military, naval, or air service, whether on active duty or on authorized leave, unless such injury or

disease was the result of the person's own willful misconduct. Venereal disease shall not be presumed to be due to willful misconduct if the person in service complies with the regulations of the appropriate service department requiring the person to report and receive treatment for such disease.

(b) The requirement for line of duty will not be met if it appears that at the time the injury was suffered or disease contracted the person on whose account benefits are claimed (1) was avoiding duty by deserting the service or by absenting himself or herself without leave materially interfering with the performance of military duties; (2) was confined under sentence of court-martial involving an unremitted dishonorable discharge; or (3) was confined under sentence of a civil court for a felony (as determined under the laws of the

jurisdiction where the person was convicted by such court).

(c) For the purposes of any provision relating to the extension of a delimiting period under any education-benefit or rehabilitation program administered by the Veteran's Administration, the disabling effects of chronic alcoholism shall not be considered to be the result of willful misconduct.

CERTIFICATE OF SERVICE

I, William F. Maready, hereby certify that on this day, to my knowledge, the foregoing Petition for Writ of Certiorari and Appendix were served upon respondents United States of American and Lawrence B. Mulloy by three copies thereof being deposited in a United States mailbox in Winston-Salem, North Carolina, with first-class postage prepaid, addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Mr. Gary Allen
Director Tort Branch
Civil Division
U.S. Department of Justice
P.O. Box 14271
Washington, D.C. 20044-4271

This the _____ day of _____, 1989.

_____

William F. Maready
1001 West Fourth Street
Winston-Salem, NC 27101
(919) 725-2351

STATEMENT OF FILING

The undersigned being duly sworn deposes and says:

I am William F. Maready, Counsel for Petitioner, Jane J. Smith, Executrix of the Estate of Michael J. Smith. I am a member of the Bar of the United States Supreme Court.

On Tuesday, October 10, 1989, I filed with the Clerk of the United States Supreme Court a Petition for Certiorari with Appendix in this action. I filed the documents by depositing same in a United States mailbox, with first-class postage prepaid, and addressed to the Office of the Clerk, One First Street, NE, Washington, DC 20543. This mailing took place within the time permitted for filing by Rule 20 of the Rules of the Supreme Court of the United States.

This the 10th day of October, 1989.

_____
William F. Maready
Attorney for Petitioner

OF COUNSEL:
PETREE STOCKTON & ROBINSON
1001 West Fourth Street
Winston-Salem, North Carolina 27101
Telephone: 919-725-2351

SWORN TO and subscribed before me, this
_____ day of _____, 1989.

_____
Notary Public

My commission expires:_____

(2)

No. 89-607

In the Supreme Court of the United States

OCTOBER TERM, 1989

JANE J. SMITH, EXECUTRIX OF THE ESTATE OF MICHAEL J. SMITH, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
BARBARA L. HERWIG
KATHERINE S. GRUENHECK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

13 pp

QUESTIONS PRESENTED

1. Whether the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), bars a wrongful death action against the United States by the estate of a serviceman who was killed while serving as the pilot of the space shuttle Challenger.

2. Whether the estate may maintain a wrongful death action against an employee of the National Aeronautics and Space Administration.

3. Whether *Feres* should be overruled.

4. Whether the estate has standing to seek to compel the United States to debar the manufacturer allegedly responsible for the death of the serviceman.

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v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 877 F.2d 40. The order of the district court dismissing the claims against the United States (Pet. App. A12-A70) is reported at 712 F. Supp. 893. The order of the district court dismissing the claims against Mulloy (Pet. App. A71-A73) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1989. The petition for a writ of certiorari was filed on October 10, 1989 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Navy Captain Michael J. Smith died in January 1986 aboard the space shuttle Challenger, to which he was assigned as pilot. For purposes of this petition, it is assumed that the cause of the accident was the failure of the aft field joint on the right-hand solid rocket booster. Petitioner, as executrix of Captain Smith's estate, instituted this action on behalf of the estate and Captain Smith's survivors against three defendants: the United States; Lawrence B. Mulloy (the manager of the National Aeronautics and Space Administration's (NASA) Solid Rocket Booster Program at the Marshall Space Flight Center); and Morton Thiokol, Inc. (the manufacturer of the shuttle's solid rocket motors). Petitioner sought damages for the wrongful death of Captain Smith, and also sought to compel NASA to debar Morton Thiokol from further work on the space shuttle program.

The district court first held that because Captain Smith's death occurred during activity incident to his military service, the wrongful death claim against the United States was barred by *Feres* v. *United States*, 340 U.S 135 (1950). Pet. App. A37-A38. The district court, in reaching that conclusion, relied on the three-part test set forth in *Parker* v. *United States*, 611 F.2d 1007 (5th Cir. 1980); under that test, whether an injury was incident to military service depends on "(1) the duty status of the service member; (2) the place where the injury occurred; and (3) the activity in which the serviceman was engaged at the time of the injury." Pet. App. A19. The district court noted, among other things, that Captain Smith "was on active military duty" at the time of the accident and that "his dependents are receiving death benefits under the Veterans' Benefits Act." *Id.* at A22-A23. Citing *Jaffee* v. *United States*, 663 F.2d 1226 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982), and *Uptegrove* v. *United States*, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S.

1044 (1980), the court also dismissed the claims against Mulloy. It held that when *Feres* bars suit against the United States, a plaintiff may not bring the same action against a civilian government employee. Pet. App. A72-A73. In addition, the district court held that petitioner lacked standing to seek to compel the government to debar Morton Thiokol. *Id.* at A38.

The court of appeals affirmed. Pet. App. A1-A8. It agreed with the district court that because Captain Smith's death was incident to his military service, petitioner's wrongful death claim against the United States is barred by *Feres*. Pet. App. A3. It also agreed that when an injury occurred incident to service, a plaintiff may not avoid *Feres* by suing a government employee individually. *Id.* at A7. In addition, the court noted that the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, "apparently would apply to this case, foreclosing plaintiff's suit against Mulloy," since the Act "provides that the exclusive remedy for individuals allegedly harmed by common law torts committed by Government employees acting within the scope of their employment is through an action against the United States" under the Federal Tort Claims Act (FTCA). Pet. App. A8. The court of appeals did not discuss petitioner's request that the United States debar Morton Thiokol, although it noted that petitioner had settled with that defendant. *Id.* at A2.

ARGUMENT

1. In *Feres*, this Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. Petitioner's wrongful death claim against the United States, while presenting unusual and tragic facts, involves a routine

application of *Feres*. As the district court stated in concluding that Captain Smith died incident to military service, "the activity in which [he] was engaged at the time of his death – piloting the space shuttle Challenger – arose by virtue of his status as a member of the armed services." Pet. App. A31. The district court further explained that Captain Smith "was aboard the space shuttle as a result of his participation in a program whereby military personnel are detailed to NASA to perform appropriate services." *Id.* at A32. Moreover, Captain Smith was on active duty at the time of the accident and, in addition to the settlement with Morton Thiokol, his dependents are receiving veterans' benefits. *Id.* at A2, A22-A23. Accordingly, the courts below correctly concluded that Captain Smith's activities while piloting the Challenger were incident to his military service. Therefore, contrary to petitioner's contention (Pet. 5-19), there is no warrant for further review of that fact-bound issue.

2. Nor is there merit to petitioner's contention (Pet. 19-28) that review is warranted with respect to dismissal of the claim against Mulloy.

a. The conclusion that a serviceman or his estate cannot sue a civilian government employee individually where *Feres* would bar a suit against the government follows from this Court's recent decisions in *United States* v. *Johnson*, 481 U.S. 681 (1987), and *United States* v. *Stanley*, 483 U.S. 669 (1987). In *Johnson*, the Court held that the estate of a serviceman who died in a helicopter crash could not bring suit under the FTCA for the alleged negligence of a civilian air traffic controller. 481 U.S. at 691-692. In *Stanley*, the Court held that when suit against the government is barred by *Feres*, a serviceman may not bring suit against individual defendants under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). 483 U.S. at 684. There is similarly no basis for allowing the estate of a serviceman whose injuries were incident to

military service to bypass *Feres* by bringing a wrongful death action against a government employee.[1]

Even before *Johnson* and *Stanley*, the courts of appeals recognized that state law tort claims against individual civilian government employees are barred if they are based on an injury suffered as an incident to military service. See Pet. App. A5-A6 & n.4. In *Jaffee*, 663 F.2d at 1239, the Third Circuit explained that such suits would be contrary to each of the rationales underlying this Court's decision in *Feres*: "Suits founded on state law have the same potential for undermining military discipline as federal tort claims. In addition, Veterans' Benefits are available for those bringing suits founded on state law, just as they are for those bringing federal tort claims suits. Allowing divergent and separate state claims would also directly contravene the third rationale for the decisions in *Feres* and its progeny – the need for uniform legal standards for military personnel." See also *Johnson*, 481 U.S. at 684 n.2 (discussing the rationales underlying *Feres*). No court of appeals has held that a serviceman injured incident to military service may sue a civilian government employee.

b. As the court of appeals recognized (Pet. App. A7-A8), there is an alternative ground of decision: petitioner's claim against Mulloy is barred by the Federal

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[1] Petitioner relies (Pet. 25-26) on *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849), where the Court allowed a marine to sue his commanding officer. However, as this Court recognized in *Chappell* v. *Wallace*, 462 U.S. 296, 305 n.2 (1983), in holding that enlisted military personnel cannot bring *Bivens* actions against their superior officers, much has changed "since the time of *Wilkes*." There is now "a comprehensive system of military justice" for resolving intramilitary disputes (*ibid.*) and "a comprehensive system of relief," the Veterans Benefits Act, to remedy injuries incurred incident to military service (*Feres*, 340 U.S. at 140).

Employees Liability Reform and Tort Compensation Act of 1988. That Act, which was passed after the events in suit, applies to pending cases. See Pet. App. A8. It provides that the remedy against the United States under the FTCA for injury "resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim." § 5, 102 Stat. 4564 (to be codified at 28 U.S.C. 2679(b)(1)). The 1988 Act further provides that, once the Attorney General certifies that the federal employee charged with misconduct was acting within the scope of his employment at the time of the incident, the United States shall be substituted as the defendant, and the suit shall then proceed against the government "subject to the limitations and exceptions applicable to those actions." § 6, 102 Stat. 4565 (to be codified at 28 U.S.C. 2679(d)(4)). Thus, the United States is to be substituted as the defendant even where, as here, suit against the government is barred. See H.R. Rep. No. 700, 100th Cong., 2d Sess. 6 (1988).[2]

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[2] In *Aviles* v. *Lutz*, 887 F.2d 1046 (1989), the Tenth Circuit recognized that a plaintiff whose claim against the government was barred by the intentional tort exception to the FTCA, 28 U.S.C. 2680(h), could not proceed against the individual government employees who allegedly harmed him. The Ninth Circuit reached the opposite conclusion in *Smith* v. *Marshall*, 885 F.2d 650, 654-656 (1989), petition for rehearing pending, No. 88-5757, holding that the 1988 Act did not preclude a medical malpractice claim against an individual where suit against the government was barred by the foreign country exception to the FTCA, 28 U.S.C. 2680(k). See also *Newman* v. *Soballe*, 871 F.2d 969, 971 (11th Cir. 1989). In reaching its conclusion, the Ninth Circuit did not come to grips with the language of Section 2679(d)(4), which provides that after the government is substituted as the defendant, the suit is "subject to the limitations and exceptions" to the FTCA. This is not an appropriate case to resolve any conflict between the circuits, however,

3. In addition to asking this Court to determine whether the courts below correctly applied the *Feres* doctrine to the peculiar facts, petitioner asks the Court to overrule *Feres*. Pet. 28-39. But this Court reaffirmed *Feres* recently in *Johnson*. Moreover, as the Court observed in *Johnson*, Congress is aware of the consistent holding that service members may not maintain tort actions for injuries incurred incident to military service, but has not "changed this standard in the close to 40 years since it was articulated, even though, as the Court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." 481 U.S. at 686 (quoting 340 U.S. at 138). Since *Johnson*, this Court has repeatedly declined to reconsider *Feres* in cases where petitioners asked that it be overruled. See, *e.g.*, *Major* v. *United States*, cert. denied, 108 S. Ct. 2871 (1988); *Atkinson* v. *United States*, cert. denied, 485 U.S. 987 (1988); and *Adams* v. *United States*, cert. denied, 484 U.S. 1004 (1988). Indeed, although the dissenting Justices noted in *Johnson* (481 U.S. at 703) that the serviceman's estate had not asked the Court to overrule *Feres*, this Court subsequently denied a petition for a writ of certiorari in *Gilardy* v. *United States*, cert. denied, 484 U.S. 1041 (1988), which arose from the same helicopter accident as *Johnson* and in which the petitioner explicitly asked the Court to overrule

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because, as both courts below held, the action against Mulloy (the individual defendant here) is independently barred by *Feres*. Moreover, this case was not litigated under the new law, which was enacted after the district court reached its decision, and in fact, the Attorney General has never certified that Mulloy was acting within the scope of his employment while he was working with Morton Thiokol in his capacity as manager of NASA's Solid Rocket Booster Program at the Marshall Space Flight Center. (The Attorney General would undoubtedly so certify, if necessary; the Department of Justice determined that it was appropriate for the government to represent Mulloy in this case.)

Feres. There is similarly no reason for the Court to reconsider *Feres* in this case.

4. Finally, petitioner contends (Pet. 39-48) that she has standing to seek an order compelling the government to debar Morton Thiokol from further work on the shuttle program. Petitioner is wrong. As this Court stated in *Valley Forge Christian College* v. *Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982): "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)." Additionally, a plaintiff must claim an interest that "is arguably within the zone of interests to be protected or regulated by the statute * * * in question." *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). Although petitioner alleges injuries resulting from the manufacturer's contractual relationship with the United States, the debarment remedy would not redress those injuries. In any event, petitioner does not come within the zone of interest protected by the debarment process. Debarment is a regulatory function performed in the public interest "for the Government's protection." 48 C.F.R. 9.402(b). The procedural protections afforded by the government are for the benefit of affected contractors. Petitioner cites no authority, and the government knows of none, to support her claimed right to act as a private attorney general in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
BARBARA L. HERWIG
KATHERINE S. GRUENHECK
Attorneys

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